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THE

REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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PREFACE TO VOLUME IV.

THIS volume brings us close upon the end of the eighteenth century. It is perhaps not rich in leading cases of the first rank, but it contains many of great importance. *Morton* v. *Lamb* is one of the best known and most profitable in the learning of dependent and independent promises. *Gordon* v. *Harper* is a landmark in the law of possessory remedies. *Attorney-General* v. *Bowyer* has, for Cambridge men at any rate, more than professional interest, as recording the singularly prolonged travail with which Downing College (only of late years well past the troubles of its infancy) was born.

Jennings v. *Rundall* is in some sense a leading case on the liability of infants, and on the rule (now much less important than it was a century ago), that substantive liability cannot be altered by changing the form of action. Yet it does not seem clear that the principle was rightly applied in the particular case. However this is immaterial at the present time. The later case of *Burnard* v. *Haggis*, decided in 1863 by a far stronger and more learned Court, 14 C. B. N. S. 45, 32 L. J. C. P. 189, affirms the principle stated long before. If I lend you a horse to ride to York,

and you ride to Carlisle, I shall have, not indeed an action of trespass *vi et armis*, because your possession began lawfully, but an action on the case: Y. B. 21 Ed. IV. 76 *b*. This is not assumpsit on the contract of bailment, but an independent action, founded on the wholly unauthorized use of my chattel. *Jennings* v. *Rundall* was perhaps not adequately argued.

A few matters of critical detail have now to be mentioned. *Tarleton* v. *Staniforth*, of which the original reports are to be found in 5 T. R. 695 (King's Bench), and 1 B. & P. 471, and 3 Anstr. 707 (Ex. Ch.), is placed in this volume among the cases from Anstruther, at p. 845. It might equally well have been printed in Vol. II., among the cases from 5 T. R., and in that case it would have preceded *R.* v. *Churchwardens of Croydon*, 2 R. R. 688. The learned reader may find it convenient to make cross-references at that page and in the Table of Cases to Vol. II. If he is curious to know why we did not print the case in that volume, we may answer indirectly by reference to the story of a certain Biblical Dictionary whose editor did not know how to please everybody in his account of the Noachian Deluge. Accordingly, when the part containing *Deluge* appeared, the only entry was "See *Flood*." When it came to the turn of *Flood*, it was "See *Noah*." In the present case we have finally decided, after being at one time in doubt (happily of a less controversial and perplexing kind), to preserve *Tarleton* v. *Staniforth*, and here it is, though in the latest possible place. It

would have made a neater transition to speak of taking it into the ark, but it has already been explained that we make no pretension to supersede the reports at large absolutely, but only for the purposes summed up under the description of practical utility.

The case of *R.* v. *Staffordshire, &c. Canal Navigation*, reported at p. 683 of this volume, forms a sequel to the cases of *R.* v. *Aire, &c. Navigation*, 1 R. R. 579, and *R.* v. *Page*, 2 R. R. 454. In this group of cases the judgments rest on the hypothesis, which has been since abandoned, that tolls *per se* are rateable under the poor law, and are consequently inapplicable for modern rating purposes. But it is impossible to say that the reasoning may not be applicable in some cases which may arise relating to tolls. And they form at least an important feature in the history of the law of rating.

One manifest error in our second volume has been pointed out by a learned correspondent in Dublin, to whom our thanks are hereby expressed. *Rorke* v. *Dayrell*, 4 T. R. 402, 2 R. R. 417, was overruled or at least not followed in *Giles* v. *Grover*, 1 Cl. & F. 72. We admit the oversight, and make the following remarks only in mitigation. There is no absolute way of knowing whether any given case in the books has been overruled or not; and when the case is on a minute and not generally familiar subject, the difficulty is much increased. And in this case we have gone astray in good company. Since the publication of Messrs. Dale and Lehmann's Digest of

Cases overruled, not followed, &c., we conceive that lawyers are entitled to rely on that most useful book as the primary source of information in such matters. Now *Rorke* v. *Dayrell* does not appear in Dale and Lehmann's Digest.

As a specimen of criticism proceeding from misapprehension of our principles, we may mention a complaint that *Bize* v. *Dickason*,* 1 T. R. 285, supposed to be a leading case, was not reprinted. The case is in truth of no authority as a decision, being inconsistent with the settled law of modern times. It was used in argument, wholly without effect, in *Barber* v. *Pott*, 4 H. & N. 759. The decision in that case overrules it if it was not distinctly overruled before. One elegant sentence of Lord Mansfield's, however, had found its way into the early editions of one or two well known text-books, and remains in the later ones, though so widely expressed as to be inaccurate for modern purposes, and capable of misleading an inexperienced student. There is little room for doubt that Lord Mansfield really intended to make the right of recovering back money paid by mistake a far wider one than his successors allowed. *Bize* v. *Dickason* ignores the modern limitation that a voluntary payment with full knowledge of the facts is not recoverable. The circumstance that one sentence of the judgment is still to be seen

* We print the defendant's name as commonly cited from the octavo edition of 1817. In the original folio of 1787 it is Dickson in the text and Dickason in the index.

in text-books is no reason for reproducing that which is clearly not modern law. Not that we by any means claim the credit of pointing out for the first time that *Bize* v. *Dickason* cannot be supported. Our correspondent might have spared his indignation if he had looked at the notes to *Marriot* v. *Hampton* in the second volume of Smith's Leading Cases (p. 449, 9th ed. 1887).

Another correspondent waxed wroth—even to the extent of declaring the Revised Reports useless—because in a case which we did reproduce a certain judgment was not reprinted in full which, as he alleged, had been cited in a recent House of Lords case. On looking into that case we found a sub-citation of the judgment in question in a passage of another reported modern judgment, which was itself cited in the House of Lords only to be disapproved. But enough of these humours. We will only repeat that serious and competent criticism is always welcome.

It may be well to explain that the announcement made in the preface to Vol. III., as to new editorial notes being distinguished by initials, was not intended to apply to mere references to later cases without comment.

F. P.

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SELWOOD v. MILDMAY

standing in his name or in trust for him: and whether he had disposed of the same; and if so, what became thereof; and whether the produce was again invested, and in what funds.

The cause coming on for farther directions, the Master's report stated, that he found by the affidavit of one of the executors, that the personal estate consisted at the death of testator of 137*l.* per annum in the Long Annuities; and that he had no other personal estate except his household furniture and certain leasehold premises specifically bequeathed; and he found by the affidavit of Thomas Francis of the Bank, that in the beginning of February, 1792, the testator sold out 3,200*l.* 4 per cent. Bank Annuities; and upon the 9th of the same month he sold the farther sum of 175*l.* 4 per cents.; which by the Bank books appear to have been all the stock he had in the said fund; and with the produce upon the 4th of February, 1792, he purchased 100*l.* per annum Long Annuities; and upon the 7th of the same month he purchased 10*l.* per annum in the same fund; and upon the ninth of the same month he purchased 20*l.* more in the said Long Annuities; and in 1795, he purchased 7*l.* more in the said Long Annuities; and from the respective purchases aforesaid and at his death he had the said 137*l.* per annum Long Annuities standing in his name; and he had not from the time he so sold out his said stock, nor at the time of making his will, nor from thence till the time of his death, any stock in the 4 per cent. Bank Annuities; and by the advice of the deponent he sold out his said property in the 4 per cents., and invested the same in the Long Annuities; and the Master found by the affidavit of —— May, that the deponent was the attorney of the testator; who received instructions from him to prepare his will; and the testator gave him as part of such instructions a former will, by which he had given divers legacies payable out of his stock in the 4 per cent. Bank Annuities; and the testator not having informed the deponent, that after making the said will he had sold out his said stock and vested the produce in Long Annuities, the deponent prepared the will, as if the said stock

[*308] *had not been so changed, and described the property as still 4 per cents.; and he believes, the mistake in the will arose from

that cause and no other; and immediately afterwards by the direction of the testator he burnt the former will.

SELWOOD v. MILDMAY.

Mr. Piggott, *Mr. Graham*, *Mr. Sutton*, and *Mr. Short*, for the legatees of the 4 per cent. stock:

This is substantially a disposition by the testator of his property; and the description is a mere mistake, and as a latent ambiguity may be explained by evidence. This is the only provision the testator has made for his wife. The Long Annuities are sufficient to satisfy these bequests. The authorities are with the reason of the thing: *Hodgson* v. *Hodgson*, 2 Vern. 593; *Day* v. *Trigg*, 1 P. Will. 286. In this case as in that the testator had no such a thing, as he describes; which is the principle stated in *Ashton* v. *Ashton*, 3 P. Will. 386, with reference to the case in 2 Leon. of tithes passing under a devise of land; because the devisor had no land: but this is a more favourable case; for this property is of the genus of that described in the will; though it does not exist in the form in which it is disposed of. *Partridge* v. *Partridge*, For. 226; *Purse* v. *Snaplin*, 1 Atk. 414; *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472. * * *

Mr. Cooke, for infant defendants: [309]

In *Fonnereau* v. *Poyntz* the inquiry went merely to the state of the property. May's evidence goes to explain the intention from acts of the testator; and therefore cannot be admitted. The cases all turn upon this; that the testator must have meant to give that property, which he had. In the case of the freehold and leasehold houses it was only a mistake of the tenure. So in the case at the Rolls the testator meant the 3 per cent. stock, that he had. This is completely a specific legacy. If a testator gives his black horse, having only a white one, that might be rectified: but if he gives a diamond ring, set so and so, that is a very different case; and if that *corpus* cannot be found, the legatee can take nothing.

MASTER OF THE ROLLS:

I do not think, this case has been quite determined by any of

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the cases, that have gone before it. I see in the case before Lord KENYON he considered, that the testator by Bank Stock meant South Sea Stock; and that it was clear, he meant to give that. But the principles of the cases determined, which are very necessary to be adopted by a judge, who wishes to effectuate the intention, are so clear, that I have no difficulty in saying, that a latent ambiguity arises from the testator's circumstances not being sufficient to meet the legacy, he had given. This is a provision for his wife; which makes it a strong case. The Court would struggle in opposition to a construction against the wife upon a mere mistake. There is no ambiguity upon the face of the will. Then the question is, whether the Court is not bound by every rule to admit evidence, where there is no ambiguity upon the will. Lord THURLOW's only doubt in *Fonnereau* v. [*310] **Poyntz* was, whether parol evidence was admissible to ascertain, whether the testatrix did not mean capital; but he had no doubt, that he must know all the circumstances of her affairs; and therefore his first opinion was, that though it did appear, she could not mean to give so much more than she could afford, yet he doubted, whether he could give the words a meaning so different from their natural meaning.

In this case the evidence is to prove, not that it is a mistake, for that is clear, but to shew, how that mistake arose; and when one reads what the case was, it would be unjust to refuse to rectify a mistake, so clearly and naturally accounted for. The testator had instructed a broker to sell out his 4 per cent. stock; and the identical money produced by that sale was invested in this Long Annuity. Nothing is now doubtful. It is clear, the testator meant to give a legacy, but mistook the fund. He acted upon the idea, that he had such stock. The distinction is this: if he had had the stock at the time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of *animus revocandi*; but if it is a denomination, not the identical *corpus*, in that case if the thing itself cannot be found, and there is a mistake as to the subject, out of which it is to arise, that will be rectified. *Mr. Cooke* puts the case of a testator giving his black horse, when he had only a white one: perhaps it would be said, he only

mistook the colour: but suppose he had more white horses: I would rather put the case of a ring or a picture. The Court could not rectify that, if the subject could not be found: but here the Court will rectify it. The case of the freehold houses is very analogous. SELWOOD v. MILDMAY.

Declare, the plaintiffs with the several legatees of the 1,250*l.* stock are entitled to their legacies out of the testator's personal estate; and it being alleged, that the personal estate is not sufficient, let the Master declare, in what proportions they are to abate.

CAMPBELL *v.* FRENCH.

(3 Vesey, 321—324.)

1797. *Feb.* 24.

LOUGHBOROUGH, L.C.

[321]

Testator by his will gave legacies to A. and B. describing them as grandchildren of C., and their residence in America: by a codicil he revoked these legacies, giving as a reason that the legatees were dead: that fact not being true, they were held entitled upon proof of identity.

A married woman, living in America, being entitled to a legacy, a commission to examine her would have been directed; but as she had been examined under a commission issued by the American Government, that was considered sufficient.

Legatee entitled notwithstanding a mistake of his name.

Legacy to a married woman, subject of a foreign state, paid to the husband; to whom it would by the law of that country belong.

THE will of the testator, dated London, 23rd of August, 1790, and disposing of personal estate only, contained the following clause:

"As I understand, that my late sister Margaret Bell has two grandchildren living in Northumberland county, Virginia, within *three miles of North Cherry Point Church, whose [*322] names are Price Campbell, a grandson, and Pinkston Campbell, a grand-daughter, I give to each of them 500*l.*"

A codicil, dated the 5th of January, 1791, contained the following clause:

"And as to the legacies or bequests given or bequeathed by my will to my sister Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they being all dead."

The fact of the death of the legatees was not true. Pinkston Campbell married William Atkins in America. The bill was filed for an account and payment of these legacies.

CAMPBELL v. FRENCH.

Evidence proving the identity of the plaintiffs was read.

Mr. Lloyd and *Mr. Harvey*, for the trustees, defendants:

This is a question proper for the decision of the Ecclesiastical Court. It is not upon the construction of the codicil; but whether it is a revocation of the bequest or not; and it is concerning personal estate only. There are many cases of devises of real estate, where upon the misrepresentation of a fact to the testator by an interested person this Court has interfered: but there is no evidence of misrepresentation, nor shewing, why he used this expression. Conversation between strangers is not evidence as to matters of pedigree; though in the family it is.

LORD CHANCELLOR:

One witness speaks from personal knowledge of both these persons. He speaks to their names and the place of their abode. The will speaks as to their being grandchildren of Margaret Bell. The will connects them sufficiently: he identifies the two persons of that name living, where the will describes. It is not a question of pedigree: it is only a question of personal identity. It is only a question, whether they are alive. They take as grandchildren, not as being particularly named. If the testator had even mistaken their names, yet if the fact was, that there were two grandchildren of Margaret Bell living there,
[*323] they would have taken. The only possible *doubt would be, if there were other persons answering the description. This is not a question peculiar to the Ecclesiastical Court. I must determine upon the same rule with regard to the construction, that the Ecclesiastical Court would. The Ecclesiastical Court could not avoid proving this codicil as a testamentary paper. It appears to me, there is no revocation: the cause being false: whether by misinformation or mistake is perfectly indifferent.

There must be a proper authority from these persons to receive their legacies; and one being a married woman living abroad, what ought to be done? I think, in some late case of that kind the consent was dispensed with. No doubt, I could send a commission abroad: but it depends a little upon the law of the country, where the party resides, whether it might not be paid

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to the husband. I think, there was before Lord Thurlow a case of a legacy to a married woman in the Prussian dominions and being a Prussian subject; and it being stated, that by the law of Prussia, when the money got there it would belong to the husband, the money was paid to him. But I rather believe, in America they dispose exactly in the same way, as we do.

Declare the legacies not revoked, the parties being alive; and let a commission issue to take the consent of the married woman; and upon the issuing of that commission I will give you an opportunity of examining more particularly as to both of them.

It appeared afterwards, that a commission had issued from the Government of Virginia upon affidavits as to the identity of the legatees; one of which was sworn by a person, who had educated them. Under that commission Mrs. Atkins consented to the power of attorney to receive the legacy executed by her husband.

LORD CHANCELLOR:

This is much better evidence of the identity than the witnesses examined in this cause. I think, the expense of a commission may be saved. This is a very regular proceeding.

Direct the executors to transfer the legacies to the Accountant General with liberty to the legatees to apply by petition upon these documents for payment; and I think, I shall order it without a commission. [324]

BRADLEY *v.* PEIXOTO.*

(3 Vesey, 324—326.)

1797.
March 10.

Rolls Court.
ARDEN, M.R.

[324]

A condition inconsistent with the gift is void; therefore upon a bequest to A. for life, and at his decease to his heirs, executors, &c., but if he attempts to dispose of the principal, over, he takes the absolute interest; and the condition, being inconsistent with it, is void.

Condition, that tenant in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void.

THIS cause arose upon the following disposition by the will of Thomas Bradley:

* *Re Dugdale* (1888) 38 Ch. D. 176, 57 L. J. Ch. 634; *Corbett* v. *Corbett* (1888) 14 P. D. 7, 57 L. J. P. 97.

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"I give and bequeath to my son Henry Bradley the dividends arising from 1,620*l.* of my Bank stock for his support during the term of his life: but at his decease the said 1,620*l.* Bank stock, principal and interest, to devolve to his heirs, executors, administrators and assigns. Having observed during the term of my life so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessaries of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the Bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt by my wife or any of my children shall exclude them, him or her, so attempting from any benefit in this will and testament, and shall forfeit the whole of their share, principal and interest; which shall go and be divided unto and among my other children in equal shares, that will observe the tenor of this will and testament."

The bill was filed by Henry Bradley against one of the daughters of the testator, who had taken out administration. The prayer of the bill was, that the defendant might be decreed to transfer the 1,620*l.* Bank stock to the plaintiff. The other children were out of the jurisdiction.

[325] MASTER OF THE ROLLS:*

The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff does not comply; and the question is, whether by the rules of this Court he can demand the legacy, not complying with the injunction, the testator has laid upon him; or rather whether the condition is consistent with the gift. Seeing the father's intent so clearly and strongly expressed I have taken some time to consider this case; and have endeavoured to satisfy myself, that

* *Note by Vesey.*—The reporter, not having been present was favoured with a note of the judgment by a gentleman whose accuracy is universally acknowledged.

I am at liberty to refuse the plaintiff the demand, which he now makes. Indeed another reason for delaying my judgment was, that there appeared to be other children, who were interested in this question, and are not parties to the cause. The reason given for not having them before the Court is, that they are all out of the jurisdiction. Had they been in this country, I should have expected them to have been made defendants, to sustain their interests: but as they live abroad, the cause has proceeded without them; and according to the opinion, I have formed of this case, they are not necessary parties; because I feel myself obliged to say, that the proviso, I have before stated, is of no effect.

I have looked into the cases that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort: *Piers* v. *Winn*, 1 Vent. 321; Pollexf. 435. The report in Ventris is very confused: but it appears clearly from the report of this case in Pollexfen, as well as from many other cases, that the Court meant to say, that where there is gift in tail with condition not to suffer a recovery, the condition is void. There are several cases of this kind collected in 2 Danv. Ab. 22, which shew, that a condition repugnant to the nature of the estate given is void: Co. Litt. 223, *a*; Dy. 264; *Mildmay's* case, 6 Co. 40. *Stukely* v. *Butler*, Hob. 168, is of the same kind; where it was held, that an exception of the very thing, that is the subject of the gift, is of no effect. In all these cases, the gift *stands, and the condition or exception is rejected. In this case then I am under the necessity of declaring, that this is a gift with a qualification inconsistent with the gift; and the qualification must therefore be rejected. This is not like *Sockett* v. *Wray*, 4 Bro. C. C. 483; for there the gift was to a *fême covert* for life; and then to such uses as she should by will appoint. She could only appoint by will; and could not bind her executors by any deed in her life-time; and I declared in determining that case, that I should think otherwise in the case of a man or any person having an absolute interest. A man could

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bind his executors; but not a *fême covert*. If this had been a gift to the son for life, and after his death, as he should appoint, and in default of appointment, then to other persons, I desire not to be understood, that it would not be good: if in default of appointment it was to go to his executors, I should doubt, whether it would be so: but I give no opinion upon this. Upon the whole, I am obliged to hold this condition repugnant to the gift and therefore void. Declare, that the condition annexed to the legacy of 1,620*l*. Bank stock is repugnant to and inconsistent with the interest given to the legatee of the stock, and therefore void; and upon payment of the costs of this suit by the plaintiff let the stock be transferred to him.

In *Peixoto* v. *The Bank of England*, Chan. 3rd of June, 1797, the subject of which was a disposition of stock by the same will in precisely the same manner, the LORD CHANCELLOR was very clearly of opinion, that it was an absolute, not a limited, interest; and decreed accordingly.

1797.
March 20, 22.

ARDEN, M.R. for the LORD CHANCELLOR.

[339]

SELBY *v.* ALSTON.*

(3 Vesey, 339—342.)

Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges: therefore where the former descends *ex parte paternâ*, the latter *ex parte maternâ*, upon their union the paternal heir has no equity.

No act of the trustee can vary the right of the *cestui que trust*: but his situation may: as where the *cestui que trust* is his heir, the right to dower depends upon which dies first.

JAMES SELBY having contracted for the purchase of certain estates in the counties of Middlesex and Hertford and the Isle of Ely, and having paid the purchase-money, afterwards by his will gave and devised "all the rest of my real and personal estate whatsoever and wheresoever to my said wife in trust, that she do thereout educate and maintain my said son until he shall attain the age of twenty-one years, and until he shall have sufficiently settled and secured to and upon my said wife what is to

* *Re Douglas* (1884) 28 Ch. D. 327, 54 L. J. Ch. 421.

be settled upon and given to her, as aforesaid; and afterwards in trust to convey and dispose of all the then rest of my real and personal estate and the produce thereof to my said son, his heirs, executors and assigns: but in case my said son shall die without issue, before he shall attain his age of twenty-one years, then in trust," &c.

The testator died before any conveyance was made of the estates agreed to be purchased. After his death a conveyance by lease and release was made to his widow; who died before her son attained the age of twenty-one. He afterwards attained the age; and died in 1772, having been always in possession of these estates from the death of his mother, and having devised them to charitable uses; which devise was void by the Statute of Mortmain.

The bill was filed by the heir-at-law *ex parte paternâ* claiming these estates against the heir *ex parte maternâ;* who was in possession. The defendant put in a general demurrer.

Solicitor-General, for the plaintiff:

The question is as to the equity of the plaintiff. The ground of his coming here is, that the legal title is in the defendant. The son being entitled in both capacities, as heir *ex parte paternâ* and *ex parte maternâ*, that made it a question of election; and it might not have been the same to him to take in either character; for his mother might have died considerably indebted. If the equitable estate merges in the legal, a *cestui que* **trust* happening [*340] to be heir of his trustee must be liable to all the judgments of the trustee.

The MASTER OF THE ROLLS suggesting, that this point had been before Lord Thurlow, and *Mr. Mansfield* and *Mr. Stratford*, who supported the demurrer, saying, it had been determined by Lord THURLOW in favour of the heir *ex parte maternâ* upon this very will in *Hone* v. *Medcraft* and *Franklyn* v. *Alston*, 23rd April, 1779, it was ordered to stand over, that it might be inquired into; the MASTER OF THE ROLLS saying, if that was so, it would not be proper for him sitting for the Lord Chancellor to give any opinion upon it.

SELBY
v.
ALSTON.
March 22.

MASTER OF THE ROLLS:

Upon looking into this case I have no objection to give my opinion; as, if it was decided by Lord THURLOW, my opinion is the same as his.

The ground of this bill is, that the plaintiff claiming as heir *ex parte paternâ* of the late Mr. Selby has an equity to call for a conveyance. The case and the premises, or at least some of them, are exactly the same as in *Goodright* v. *Wells*, Doug. 771. When this was mentioned, it occurred to me, that the question had been already decided by Lord THURLOW in some other cause. After a verdict at law and a judgment determining, that at law it descended to the heir *ex parte maternâ*, with a very strong opinion of three of the Judges, that equitably the heir *ex parte paternâ* could have no claim, though one Judge gave an opinion to the contrary, it does appear, that the point, whether argued or not, came on before Lord Thurlow. The Register's Book contains farther directions in two causes. Both bills were restrained twelve months; and it was ordered that Wells and the Franklyns, claiming as heirs upon the part of his father's mother, should bring an ejectment; that Sir Rowland Alston claiming on the part of the mother should also bring an ejectment; that there should be a trial at bar; and that Sir Rowland Alston might also attend at the trial of the ejectment brought by the Wells's. The ejectment was under the direction of this Court: that is certain. Upon farther directions his Lordship declared, that the devise in the will of the several freehold and leasehold estates thereby given to the charity was void; and it was ordered, that the title-deeds of the estates in St. Clement's Church Yard and at
[*341] Hertingfordbury should be delivered to Sir Rowland *Alston, who recovered in the ejectment; and that the receiver should be discharged.

If any equity remained between these heirs, this decree could not have been made. The equitable point was raised in the court of law; and the Judges gave their opinions upon it; and Lord THURLOW delivered up possession to the person claiming as heir *ex parte maternâ*.

Then the next question is, whether upon the case made by the plaintiff he is entitled to an equity. The question at law was

clear: there could be no question about that: but the Judges intimated their opinions upon the equitable point. The argument of Mr. Justice WILSON was more equitable than legal. We have an intimation of the opinion of Lord MANSFIELD and a strong opinion of the Judges ASHHURST and BULLER against the equity. Mr. Justice WILLES's opinion was in favour of the equity. The question now is, whether upon the case now coming before a court of equity the opinion of the three Judges is such as this Court will follow. I do not say the case is free from all difficulty; and there may be good reason to contend, that the situation of the trustee shall not affect in any degree the estate coming from him to his *cestui que trust*: but I must not lay that down too broadly; for that is not the fact. In *Philips* v. *Brydges*, I stated as a universal proposition, that wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former. I stated, and I think I was warranted in so doing, that no act of the trustee can in any degree vary the right of the *cestui que trust*: but I did not state, nor upon full consideration am I prepared to say, that it was ever held that the situation of the trustee and the operation of law arising from that situation and the relation to the *cestui que trust* does not make considerable difference in the estates to be taken: as for instance, supposing the trustee was an ancestor of the *cestui que trust*, and dies: and then the *cestui que trust* dies: is there any doubt that his widow would be dowable: though if the *cestui que trust* died first, she unquestionably would not. It has been argued that the trustee is a mere instrument, and his situation or act can have no effect at all upon the estate. I have put a case where the fact being, that the legal estate descends upon the *cestui que trust* and is united with the trust estate, *he becomes solely seised at law; [*342] and both his widow and heir are entitled. Therefore the situation of the trustee (I do not say, his act) may make a considerable difference. If the widow of Mr. Selby had conveyed to the son, it is clear, he would have taken an estate descendible to his heirs *ex parte paternâ*. Suppose she had made a feoffment to the use of herself for life; remainder to her son: she would have had no intention of giving the estate in any new line: (it is to be

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supposed, she would rather it should continue in the line, that would carry it to her own heirs) but that act, though not done with that view, would have such an effect. So, where an heir takes by devise instead of by descent, the consequences are different; but that was never insisted on as a ground of equity. If an heir *ex parte maternâ* takes by devise, that would let in his heirs *ex parte paternâ*, and if they fail, his heirs *ex parte maternâ* also: if he takes by descent, he would only take an estate descendible to his heirs *ex parte maternâ;* and yet, if he can take by descent, the law makes him take so. The case of an escheat does seem a hardship upon the line of heirs, that would have succeeded if Mr. Selby had taken from his father. That is the only argument that pressed upon my mind. Where the person himself has an equal, co-extensive, estate at law and in equity, the legal shall prevail notwithstanding the case I put of the escheat. I have not found that courts of equity have ever upon that circumstance held, that he is not to be considered as having a co-extensive estate in law and equity.

The case relied upon in *Philips* v. *Brydges*, was *Wade* v. *Paget*, 1 Bro. C. C. 363. There Lord THURLOW lays down a universal proposition, to which I am inclined to accede; that where the estates unite, the equitable must merge in the legal. That was the principle of the opinion of the Judges in *Goodright* v. *Wells;* and upon consideration I am inclined not to lay any restriction upon or to narrow it in any respect, but to hold, that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail, the equitable is totally gone for the purpose of being acted upon by any person in this Court. Therefore that being to be laid down universally, this demurrer must be allowed against the plaintiff claiming as heir *ex parte paternâ*.

BATSFORD *v.* KEBBELL.*

(3 Vesey, 363—364.)

1797.
May 12, 13.

LOUGHBOROUGH, L.C.

[363]

Testatrix gave to A. the dividends of 500*l.* stock, till he should attain the age of thirty-two; at which time she directed her executors to transfer the principal to him; the legacy does not vest till the age of thirty-two.

THE testatrix gave and bequeathed to Robert Endly the dividends that should become due after her decease upon 500*l.* 3 per cent. Bank Annuities, until he should arrive at the full age of 32 years; at which time she directed her executors to transfer to him the principal sum of 500*l.* of her 3 per cent. Annuities for his own use.

Robert Endly died before he attained the age of 32. The bill was filed by the residuary legatee; and the question was, whether the vesting of the legacy or the time of payment only was postponed, till the legatee should attain the age of 32.

Attorney-General and *Mr. Johnson*, for the plaintiff:

The particular expressions of this will take it out of the general rule; and shew the intention, that if the legatee should die under the age of 32, he should not have the legacy. There is no gift of the principal, but in the direction to transfer at a time, which never arrived. The difference is between a gift of the *corpus*, taking it out of the residue, and a gift of the dividends only, the fund being to be taken out at a future period. The construction of the defendant is to devest a sum of money out of the residuary legatee. Though he would be obliged to pay the dividends, yet in the mean time, the bulk would be his property, and is only to be taken out of him upon the event described by the testator; which has never taken place.

Mr. Graham and *Mr. King*, for the personal representatives of the legatee, relied on the distinction established between the words "when" and "if" both as to real and personal estate: *Doe* v. *Lea*, 3 T. R. 41, 1 R. R. 631; *May* v. *Wood*, 3 Bro. C. C. 471.

* *Re Bunn* (1880) 16 Ch. D. 47; *Re Wrey* (1885) 30 Ch. D. 507, 510, 54 L. J. Ch. 1098; *Scotney* v. *Lomer* (1886) 31 Ch. D. 380, 55 L. J. Ch. 443.

BATSFORD *v.* KEBBELL.

LORD CHANCELLOR:

It strikes me at present that there is a very precise distinction here between the dividends and the fund. If I construe it a gift of the fund to him, I must strike out the suspension of it till the age of 32. I wish to look at the cases.

[364]

LORD CHANCELLOR:

May 13.

I have read over the will, and have looked into the cases, and am confirmed in my opinion. Upon the cases it appears, that dividends are always a distinct subject of legacy, and capital stock another subject of legacy. In this case there is no gift but in the direction for payment; and the direction for payment attaches only upon a person of the age of 32. Therefore he does not fall within the description. In all the other cases the thing is given, and the profit of the thing is given.

Declare, that this legacy of 500*l.* stock in the event, that has happened, fell into the residue upon the death of Robert Endly; and direct a transfer to the plaintiff.

WADLEY *v.* NORTH.*

1797.
May 15, 22.

Rolls Court.
ARDEN, M.R.

[364]

(3 Vesey, 364—367.)

Note.—See preceding case.

Legacy in trust for testator's mother and sister for life, and after the death of the survivor for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at twenty-one; and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. Testator in India gives all his estate and effects to A. in England in trust, and directs his property to be remitted to him; and after several legacies he gives A. 800*l.*, and requests him as soon as the property is remitted to lay out the same in the funds or other securities which shall appear most advantageous for those, who shall be benefited by it hereafter: the 800*l.* is a beneficial legacy, not in trust.

THOMAS WESTON by his will dated the 23rd of September, 1787, and made in the East Indies, after payment of all his debts and funeral expenses, gave, devised and bequeathed, all his estate and effects both real and personal wheresoever and

* *Merry* v. *Hill* (1869) L. R. 8 Eq. 619, 625.

whatsoever, except as after-mentioned, to his friend Mr. Percival North, his executors and administrators, in trust and for the following uses: first, to pay the annual amount, profit and produce, thereof unto his mother Ann Weston and his sister Ann Wadley and the survivor in half yearly or quarterly payments, as may be most desirable (the moiety thereof, which his sister should be entitled unto and receive during the life of his mother, being intended for her own and separate use and benefit) for and during the term of the natural lives; and from and after the death of the said mother and sister the survivor of them in trust to pay and apply the same to and for the use and benefit of all and every the child and children of his aforesaid sister, "which shall or may be living at the time of her death, share and share alike; each receiving his or her respective share of the principal thereof upon his or her * attaining the age of twenty-one years, [*365] and if but one child should be so surviving, then in trust to pay and apply the whole to such surviving child upon his or her attaining the age of twenty-one years as aforesaid."

Then after several specific and pecuniary legacies, "I give and bequeath unto my friend Mr. Percival North the sum of 800*l.* and I request of him as soon as my property shall be remitted to lay out and invest the same in the public funds or other securities which to him shall appear most advantageous for those who shall be benefited by it hereafter."

The testator appointed two executors in India, and requested them to lose no time in collecting and realizing his property and remitting the same to Percival North; which they did accordingly.

The testator died in 1789. Ann Wadley died in April, 1790; and Ann Weston died in May, 1793. Ann Wadley had four children living at the death of the testator; she had one other son born after the death of the testator; who died at the age of six weeks in the life of Ann Weston and Ann Wadley. Of the other four children two, viz. Samuel Wadley and John Wadley, died after the death of Ann Wadley and in the life of Ann Weston; Samuel in September, 1791, and John in February, 1792; both under the age of twenty-one. Their father took out administration to them, received their shares from Percival North, and afterwards became a bankrupt. The bill was filed on

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behalf of the surviving children; and the questions were, 1st, Whether the deceased children Samuel and John took vested interests: 2ndly, Whether the defendant was justified in retaining 800*l.* as a beneficial legacy to himself, or whether it was given to him in trust.

Mr. Lloyd and *Mr. Wooddeson*, for the plaintiffs:

The meaning is, that the children should survive Ann Weston and Ann Wadley and should also attain the age of twenty-one. That must be the construction of the words "so surviving." It may admit the construction, that children living at the death of the survivor were intended.

[366] The defendant is a trustee as to the legacy of 800*l.* for the next of kin: there being no disposition of it.

Mr. Graham and *Mr. Alexander*, for the defendant:

There are several cases to shew, that this interest vested at the death of Ann Wadley in all the children then living, and that the enjoyment only was postponed. There is no gift over in the event of the death of all the children under the age of twenty-one; which clearly shews the intention.

As to the second question, according to plain grammatical construction the direction to lay out and invest in the public funds, &c. refers, not to the legacy of 800*l.*, but to his property, which he directs to be remitted to the defendant.

Mr. Lloyd, mentioning *Batsford* v. *Kebbell* (*ante*, p. 15), upon the first point, the MASTER OF THE ROLLS wished to have an opportunity of seeing a note of that case. His Honour declared his opinion to be very clear in favour of the defendant upon the second point.

MASTER OF THE ROLLS:

May 22. The only question now remaining is, whether any vested interest accrued to the children before the age of twenty-one. If the testator had stopped at the words "each receiving his or her respective share of the principal thereof upon his or her attaining the age of twenty-one years," there could be no doubt

upon the principles laid down in these cases as well as that adopted in *Batsford* v. *Kebbell*, that it would be a vested interest; the principal being given, the payment postponed: but it is contended, that the word "surviving" in the next clause must refer not to such child as should survive the mother, upon which survivorship the legacy was first given, but to such as should survive the mother and also survive the age of twenty-one. Take the words, as they stand: "and if but one child should be so surviving, then in trust to pay and apply the whole to such surviving child." It does not stop there: if it had, there would be more reason to contend, that it meant both surviving the mother and likewise the age of twenty-one: but it says "upon his or her attaining the age of twenty-one years as aforesaid." It was perfectly nugatory to put in those words, if it meant surviving *both the mother and the age of twenty-one. Therefore upon the true construction, whether he did or did not mean, that it should apply to both, the only survivorship, that appears to me, to which he could refer, was surviving the mother. In *Batsford* v. *Kebbell*, the LORD CHANCELLOR states the distinction, which I believe is the case, that in all these questions there has been a gift of the principal legacy and a postponement of the payment; but in that case there were no words of gift of the principal, but merely of the dividends; and then the principal to be transferred at a particular age; and therefore it was not vested till that time. That is not the case in the present instance; for here the principal is given by express words, and limited to all the children living at the death of the testator's sister; and I am of opinion, that upon the true construction, coupled with the principles laid down as to vesting, it must be to all the children, and the survivorship is only with reference to the mother. Consider the consequence to the other children, if I am obliged to adopt the contrary construction; for according to that, if these children die before the age of twenty-one, nothing is given at all; which adds much strength to the ground, I take. The Court would hardly put upon a will, a construction, that would create an intestacy, if it could be avoided. The construction, I adopt, is farther strengthened by the time pointed out in this will; which is the time, at which

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the law would give it. If a farther time is specified, which was the case in *Batsford* v. *Kebbell*, it may be supposed, the time may constitute one of the grounds, upon which the legacy should vest, but when the time appointed is only that, at which the law would put them in possession, it very much fortifies the argument, that it is not meant as the time, at which it should vest, but only, at which they should take possession.

I have already given my opinion as to the legacy of 800*l.* upon which there is no doubt.

1797.
May 13.

LOUGHBOROUGH, L.C.

SHUTTLEWORTH, EX PARTE.

(3 Vesey, 368.)

A person giving cash for a bill without the indorsement of the person from whom he takes it, cannot prove it under his bankruptcy.

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THE bankrupt had before his bankruptcy procured cash from Newton for a bill of exchange; but did not indorse the bill; because Newton desired him not to put his name upon it; as he thought the bill would have as good credit without it. Newton proved in respect of the bill, and received a dividend under the commission. The petition was, that the proof might be expunged, and the dividend refunded.

Mr. Cooke, for the petition:

In *Ex parte Whitter* in the matter of *Jeffery*, 7th February, 1790, and in other cases since, Lord THURLOW determined, that a person taking a bill in this manner was a purchaser of it, not a discounter; and therefore could not be admitted to prove. In one of the cases the bankrupt said, there was a private mark upon all bills, which he transferred without indorsement; and when he saw that mark, he considered himself liable to pay, as if he had indorsed: but Lord THURLOW thought that within the same rule. In another case a person had entered into an engagement, that he would pay the bill in the same manner as if he had indorsed it; but Lord THURLOW held that engagement collateral.

LORD CHANCELLOR made the order according to the prayer of the petition; observing, that upon the affidavit there was an express agreement for a purchase of the bill.

SHUTTLEWORTH, Ex parte.

WILLIAMS *v.* DUKE OF BOLTON.

(1 Cox, 72—74.)

1784. *Feb.* 24.

THURLOW, L.C.

POWLETT *v.* THE DUCHESS OF BOLTON.*

(3 Vesey, 374—378.)

1797. *May* 23.

LOUGHBOROUGH, L.C.

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A. tenant for life; remainder to his sons successively in tail male; remainder to B. for life and to her sons in the same manner; with trustees to preserve contingent remainders; A., being also seised of the reversion in fee, cut and sold timber before the birth of a tenant in tail: afterwards B. had a son, who died soon after his birth, and another son, who survived A. The produce of the timber was decreed to be laid out in the funds during the life of A.; and upon his death without having had a son was decreed to be laid out in land, to be settled to the uses of the estate, upon which the timber was cut.

CHARLES Duke of Bolton devised several real estates to the use of his brother Lord Harry Powlett for life; remainder to trustees to preserve contingent remainders; remainder to the use of his first and other sons successively in tail male; remainder to the use of Jean Mary Powlett Brown for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons successively in tail male; remainder to the use of the right heirs of the testator.

The testator died in 1765 without lawful issue; upon which the title descended upon his brother and heir at law Lord Harry Powlett; who entered upon the estates under the will.

By the decree made on the 12th of December, 1768, in the cause of *Williams* v. *The Duke of Bolton* the will was established; and it was ordered, that the Master should inquire, whether the defendant, the Duke of Bolton, had felled any and what timber on the estates in question, that were growing thereon at the time of the testator's death; and to what uses the same had been applied.

In 1778 Thomas Orde married Jean Mary Powlett Brown; [375]

* *Birch Wolfe* v. *Birch* (1870) L. R. 9 Eq. 690, 39 L. J. Ch. 345.

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and the said Jean Mary was delivered of a son, named Charles Powlett Orde; who died soon afterwards. She was afterwards delivered of another son, named William Powlett Orde.

The Master by his report, dated the 20th of March, 1783, certified, that the Duke of Bolton had felled several timber trees, that were growing on the said estates at the time of the death of the testator; part of which timber was used in repairs on the said estates; and part was sold by the Duke for 2,943*l.* 10*d.* which he applied to his own use: and under the decree † made upon

† *Williams* v. *The Duke of Bolton.* The following note of the judgment of Lord THURLOW in that case is taken from 1 Cox, 72.

[1 Cox, 72.] LORD CHANCELLOR:

I have not the particular circumstances of the case now in my head; but the general ground, upon which I intended to go when I made the order was this: The Duke was tenant for life (not without impeachment of waste), with contingent remainders to his own children, with remainder to Miss Powlett (afterwards Mrs. Orde) for life, with remainder to her first and other sons in tail, with remainder to the Duke in fee. The Duke being seized for life, and also of a vested remainder in fee, while the contingent estates were in expectancy, cut down timber, and the question is, to whom the timber shall belong. If any other

[*1 Cox, 73.] person entitled in remainder to *an estate of inheritance had been in being at the time, the law would have thrown the timber on that remainder; but I was of opinion, that although the Duke had a vested remainder, yet as it was not competent for him to cut down the timber in respect of his life estate, he could not take advantage, in respect of his estate in remainder, of his own wrong. I thought if the case had been so shaped in the pleadings, it would have been a fraud on the settlement (especially considering the express words of the settlement). If he then was not entitled to the timber, the question was, who should be? Mr. Orde had had a son born, who died soon afterwards; the father administered to him, and it was argued, that the timber belonged to his son (and consequently to his father as his administrator), by a sort of analogy to what would have been the case if the timber had been cut down during that estate tail. My opinion was, that it did not belong to him by the operation of the law; and I did not see any rule of equity to bring him *quasi* within that situation. My opinion was that the fund would be part of the estate tail: another son is born of Mrs. Orde; does it belong to him? I think at present, no. He takes an estate tail, always subject to be divested by a subsequent estate of a child of the Duke's coming into being. The timber is part of the realty; by an accident (as to all but the Duke, and him therefore I bar) it is severed from the realty, and becomes in its nature personalty, but yet bound as far as it can to the uses of the realty. In this I follow the rule laid down in a case which was much contested, that of *Pelham* and *Gregory*. The Duke may now have sons; if so, there is no estate but what is subject to be divested, for though the remainder vests, it vests only in expect-

farther directions on the 25th of February, 1786, and an order made on the 2nd of June, 1786, the said sum of 2,493*l.* 10*d.* and the sum of 2,102*l.* 11*s.* 3*d.* interest from the time the same was received by the Duke were laid out in 6,552*l.* 14*s.* 10*d.* 3 per cent. Consolidated Bank Annuities in trust in the cause, with liberty to apply.

Harry Duke of Bolton died in 1794 without having ever had a son; upon which Thomas Orde (now Thomas Orde Powlett) as administrator of his eldest son Charles presented a petition to have the said sum of 6,552*l.* 14*s.* 10*d.* 3 per cent. Consolidated Bank Annuities transferred to him: but the LORD CHANCELLOR directed a bill to be filed. The defendants were William Powlett Orde Powlett, the second son, tenant in tail of the estates, and the Duchess of Bolton, executrix of the late Duke.

Attorney-General and *Mr. Hollist*, for the plaintiff:

The question now comes on unprejudiced by what Lord THURLOW did. This ought to be considered as the property of the eldest son; who came into being, and was tenant in tail: but if not, it ought to be considered, not as the property of William Powlett Orde Powlett, or of the Duchess as representing the Duke, but still as real estate; in which Mrs. Orde would have a right to such an interest as would entitle her husband during coverture. Many difficult cases might be put upon this last point. To meet those difficulties it must necessarily be considered as part of the realty severed by accident, and turned into personalty, of which the first son being tenant in tail * became entitled to the absolute interest. He must be held to have some interest either as tenant in tail or in some other way; what that interest is, it is very difficult to determine. From *Whitfield* v. *Bewit*, 2 P. Will. 240, I collect, not that because it is the [*376]

ancy, and is liable by the rules of law to other uses springing to the prejudice of such expectancy. The Master must therefore take an account of the timber, and compute interest at 4*l.* per cent. The money to be paid into the bank to the credit of the cause, and subject to further order; and any person to be at liberty to apply to the Court. I do not at present see the person to whom I can give it, but if any think they have a right, they must *apply. I do not think there ought to be any costs given. [*1 Cox, 74.]

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property of the person having the first vested estate of inheritance, therefore it shall be the property of a person, who comes into being, and has a vested estate of inheritance after the severance; but as the legal right would not be the measure of the right in this Court, so the legal rights of others would not form the measure of the equitable rights of others in consequence of the wrongful act of A. There were in that case trustees to preserve contingent remainders; as Lord HARDWICKE says from the Register's Book in *Garth* v. *Cotton*, 1 Ves. Sen. 553. The Court held, there was no equity to take away the vested right in the person seised of the first estate of inheritance at the time of the severance. *Garth* v. *Cotton* turned upon the recovery; and therefore is not decisive of this cause. If *Whitfield* v. *Bewit* be law, it is clear, that if the son of Mrs. Orde had been in being, notwithstanding the possible interests of those to take after the Duke, that son would have been entitled absolutely to the money. Is the circumstance of his not being then in existence to vary the rule? The consequence would be, that if the timber was felled one day before Mrs. Orde was delivered of this son, and the son died one day before the age of 21, he would not have taken it; if he had come *in esse* the day the timber was cut, and had not lived beyond the next day, still according to *Whitfield* v. *Bewit* he would have been entitled. Therefore it would depend upon the loose circumstance, whether he was born one day sooner or later. The principle of the Court is, not that the intent of the settlement and all the uses shall be served by the application of the money produced by timber wrongfully cut, but that the plaintiff is entitled as administrator to the first tenant in tail; who is absolutely entitled. *Saville* v. *Saville*, cited 1 Ves. Sen. 548; Amb. 371. *Oxendon* v. *Lord Compton*, 2 R. R. 131.

Mr. Mansfield, for the defendant William Powlett Orde Powlett:

This is not like any decided case. The person entitled must be by analogy to the rules of law a person having a complete estate of inheritance. The first son of Mrs. Orde, who was not born till after the severance, and who lived only five days, never had any right to the estate, of which the timber was part. His

estate was liable to be devested by the birth of a son of the Duke; it is *impossible therefore to consider him as having any vested right. Lord THURLOW thought the claim on his part utterly impossible. When the Court interposes in such a case to preserve the money, what can be done but to give it to the person having the first vested estate of inheritance; to whom the timber would belong, if it was felled by any one? If the timber was now upon the estate, it would belong to this defendant. As to the other claim, the money is to be considered just as the timber; the tenant for life therefore is not at all concerned; and cannot have any benefit from the interest. The money cannot be considered as real estate, or to be laid out in land; for then it must be applicable to all the uses of the settlement; and might go to the Duke: but the Court would never suffer him to be benefited by his wrongful act.

Mr. Alexander, for the Duchess of Bolton, said, he was not instructed to press her claim.

LORD CHANCELLOR:

The only *scintilla* of right, she has as representing the Duke, would be to take this after all the uses of the settlement are exhausted; supposing it is to be laid out upon those uses.

I should like to know, whether there is any account of that case of *Saville* v. *Saville*;† but independent of that, I think it impossible for the Court to decree it to belong to any person, who could not by possibility have a legal title. In *Whitfield* v. *Bewit* the Court held it a mere casualty; and that there was no equity to take it from the person, who had a legal title and could have brought an action of trover. When this timber was cut, no doubt, at law the Duke would have taken, being the first owner of the inheritance: but the Court very properly held, that he should not by a fraud upon the settlement, which made him tenant for life, gain that advantage to himself in his reversion in fee. Considering it as a wrong upon the settlement, the consequence is, that part of the property, which by the fraud is taken

† See 2 Atk. 458. It does not appear there, that the timber was wrongfully cut.

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from the settlement, ought to be restored to the settlement. The consequence is, that will carry it throughout to all the uses. It is to be considered as realty; Mrs. Powlett therefore will be entitled to an estate for life; the children to estates in tail male; and I cannot help the consequence of the reversion in fee going to the Duke.

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Mr. Dickens refers me to a case in point, *Tullet* v. *Tullet*:* the mother claimed as one of the representatives of the infant: Sir THOMAS CLARKE decided, that she was not entitled under her own wrongful act: but he directed it to be laid out to the uses of the settlement.

The money was directed to be laid out in land to be settled accordingly.

The *Solicitor-General* mentioned *Tully* v. *Tully*; where the same thing was done by Sir THOMAS SEWELL. Trustees empowered to cut timber to pay debts cut a great deal more than was necessary. Sir THOMAS SEWELL said, it was an abuse of trust; that no person ought to take advantage of it, and it should go according to the settlement of the estate.

1797. *May* 24.

LOUGHBOROUGH, L.C.

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WILLS *v.* STRADLING.†

(3 Vesey, 378—382.)

Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense and continuance of possession after the expiration of the old lease and payment of an increased rent under the agreement: plea of the Statute of Frauds ordered to stand for an answer with liberty to except.

THE bill stated the following case:

The plaintiff was lessee of a farm for seven years at the rent of 34*l.* a year under the defendant, the widow of the lessor; under whose will she is entitled to the premises during her widowhood. The lease being to expire in 1794, the plaintiff in June, 1793, being desirous of making some improvements upon the premises,

* Amb. 370; 1 Dick. 322. † *Nunn* v. *Fabian* (1865) L. R. 1 Ch. 35.

which would be attended with a very considerable expense, applied for a new lease for the term of 14 years. The defendant agreed to grant a lease for the said term, if she should so long live and continue a widow, at the rent of 36*l.* a year; and immediately or very shortly after the agreement the plaintiff upon the faith of the agreement and in confidence, that he should enjoy for the 14 years under the agreement, began to make improvements, and hath laid out a great deal of money upon the premises. The plaintiff continued in possession after the expiration of the former lease; and paid the increased rent; for which the defendant gave him receipts.

The bill prayed a specific performance of the agreement.

The defendant pleaded the Statute of Frauds, with an averment, that there was no agreement in writing.

Mr. Romilly, for the plaintiff:

All the circumstances of part performance, upon which cases have been taken out of the Statute concur * in this case. As to payment of money, 3 Atk. 4. In *Stewart* v. *Denton* † there was only delivery of possession. In *Floyd* v. *Buckland*, 2 Freem. 268, there was only a wall built. The question is, whether the plaintiff has put himself to a considerable expense. [*379]

Solicitor-General and *Mr. Short*, for the defendant:

As to the delivery of possession, it must be from a person, who is in possession: a mere continuance of possession in a tenant will not do. Notwithstanding what is said in 3 Atk. 4, simple payment of money is no part performance: *Charlewood* v. *The Duke of Bedford*, 1 Atk. 497. The Statute has made the distinction between goods and land. As to money laid out in faith of the agreement, there is no ground, as it is here stated. It is no part of the contract between the parties, that money should be laid out; and therefore is no evidence of the existence of a contract. This is not the case of a house taken upon a building or repairing lease. The bill does not aver, that it was laid out with the privity of the defendant. The act stated as a part performance must be an unequivocal act, consistent only with the

† 1 Fonb. Tr. Eq. 175.

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existence of that agreement stated in the bill. The extent of the improvements, the proportion they bear to the value of the estate, &c. are not stated. This is not averred to be in pursuance of the contract or in part performance of it. If these cases are looked at, there is not a single case, where it was not an essential part, that possession should be delivered in pursuance of the contract; nor any authority, that a mere holding over and money laid out without any contract stated, that certain things should be done for improvement of the premises, will take it out of the statute. The payment of the increased rent stands exactly upon the same footing as payment of money upon the sale of an estate; and amounts to nothing. If payment of an increased rent and money expended at the option of the tenant would do, how could a landlord advancing the rent be safe from the mischief, the statute intended to prevent? It would be very dangerous to admit evidence of conversations upon the single circumstance of payment of an increased rent; which is an equivocal act. The act ought to be unequivocal: from which the Court might see unquestionably an agreement, that would not be good under the statute; and that the act was done in pursuance of that agreement; which makes it unconscientious to insist upon
[*380] the statute. In *Charlewood* v. *The* * *Duke of Bedford* a great variety of things was done; and there was even a sort of memorandum. The acts were equivocal. It was possible the contract might have been with Rich, not with the Duke. The improvements, might have been for his own accommodation. It was an essential part of that case, that the defendant insisted, the steward had no right to enter into the agreement. I do not say, it was finally determined upon the incompetency of the circumstances to take it out of the statute. Nothing can be more vague than the allegation in this bill, that the plaintiff began to make improvements, and hath laid out a considerable sum of money. The plea is proper without an answer: *Cottington* v. *Fletcher*, 2 Atk. 155; *Hollis* v. *Whiteing*, 1 Vern. 151: the latter part of that case was overruled in *Whitchurch* v. *Bevis*, 2 Bro. C. C. 564, 565. *Whaley* v. *Bagenal*, 6 Bro. P. C. 45, is much stronger than this. Lord THURLOW, 2 Bro. C. C. 567, expresses himself very strongly as to that case; saying, it has fixed the

rule upon a basis of authority a great deal too strong to be overturned or answered.

Reply:

The statute has certainly been overruled in many cases; but it is still more dangerous to overrule those rules, that are now become as sacred and as well known as the statute itself. The question now is, whether the plaintiff is entitled, not to a specific performance, but to any answer from the defendant. The question, whether it ought to be averred, that there was no such performance as is alleged in the bill, because it would overrule the other part, was very much discussed in *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404; and *Whitchurch* v. *Bevis*: but the only question there was, whether it did not from that circumstance become impossible to plead the statute, when the bill alleged part performance; and I believe, in the result Lord THURLOW thought, there might be such a plea. It has been decided, that payment of part of the purchase money is not a part performance: other cases have held that it is: but that payment of the whole purchase-money is not a part performance, was never decided; and there is Lord HARDWICKE's *dictum*, that it is. In *Charlewood* v. *The Duke of Bedford* the plaintiff continued in possession exactly as he held before; and there the plea was ordered to stand for an answer; which is all this plaintiff desires. But this plaintiff could not hold under the former lease; the payment of a new rent shews decisively some agreement. It is incumbent on the defendant to say, what that agreement was. *Hollis* v. *Whiteing* is not a decision; for in 1 Vern. 159, it went to *law: but it has been overruled in many cases. [*381]
In *Whitbread* v. *Brockhurst* it was pressed upon Lord THURLOW in the strongest manner; who says (1 Bro. C. C. 417), that an agreement partly executed has been considered as out of the statute; that he always thought the Court considered it as fraudulent to make the contract, and lead on the other party to lay out his money in the melioration of the estate, and then withdraw from the performance of the contract; and whether the money is well or ill laid out is indifferent: the fraud is the same. It was never held necessary to aver that it was part of the

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agreement that the money should be laid out, or that it was with the privity of the defendant. In *Whaley* v. *Bagenal* there was no part performance. I rely upon the fact of payment of the increased rent, which is evidence of some agreement; also upon the improvements and money laid out. That it was part of the agreement is not material, if it turns upon fraud.

LORD CHANCELLOR:

In *Whaley* v. *Bagenal*, there were a vast many circumstances of conduct and behaviour upon the supposition of an agreement; but none that amounted to part performance. One strong circumstance was the vendor setting up that purchase, which he afterwards denied, as a defence against an *elegit*.

Though in general I feel a very strong inclination to support the Statute of Frauds and to give the party the benefit of it by way of plea, I think I must in this case call upon the defendant to make an answer to one part of the bill. Three grounds are stated: possession by the plaintiff; which he refers to the agreement: payment of an increased rent; which he also refers to the agreement; and the circumstance stated of considerable sums of money having been laid out upon the improvement of the farm. As to the first ground, the possession, in the case of a tenant, who of course continues in possession, unless he has notice to quit, the mere fact of his continuance in possession, (which is all the plea can admit, for *quo animo* he continued in possession is not a subject of admission,) would not weigh. The delivery of possession by a person having possession to the person claiming under the agreement is a strong and marked circumstance: but the

[*382] *mere holding over by the tenant, which he will do of course, if he has no notice to quit, would not of itself take the case out of the statute or even call for an answer. As to the money laid out I feel the distinction pressed by the Solicitor-General very strongly; that if it was part of the contract, that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord) it is very strong to take it out of the statute. But the circumstance, which I think distinguishes this case, is the payment of the additional rent. Payment of additional rent *per se*

is an equivocal circumstance, it is true. It may be, that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is, that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence: it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. *Charlewood* v. *The Duke of Bedford*, which finally turned upon the want of authority in the steward, is an authority upon which, under the circumstances alleged in this bill, the benefit of the plea ought to be saved to the hearing. Let the plea stand for an answer, with liberty to except.

As to the danger mentioned by the *Solicitor-General*, and which I a little anticipated, if the defendant admits the agreement as stated in the bill, there can be no danger: if he does not admit the agreement as stated, it will come to be a very material question, whether I should permit that agreement to be substantiated by any parol evidence.

THE DUKE OF NEWCASTLE *v.* THE COUNTESS OF LINCOLN.

1797.
Jan. 25, 31.
Feb. 1.
June 3.

(3 Vesey, 387—398; 12 Vesey, 217—239.)

LOUGHBOROUGH, L.C.

1806.
Feb. 17, 18, 24.
April 14, 18.

House of Lords.

Covenant in a marriage settlement to settle leasehold estates in trust for such persons and such or the like estates, ends, intents and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders: the Court in executing the covenant declared, that no person should be entitled to the absolute property, unless he should attain twenty-one, or die under that age, leaving issue male.

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By indentures of lease and release, dated the 13th and 14th of May, 1772, reciting, that in consideration of an annuity of

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3,000*l.*, to be paid to the Earl of Lincoln during the joint lives of the Duke of Newcastle and the Duchess Dowager of Newcastle, and a farther annuity of 1,000*l.* to be paid to him after the decease of the said Duchess during the joint lives of the Duke and the said Earl, and in consideration, that the Duke had expended upwards of 70,000*l.* in building the mansion house at Clumber, which he had agreed to settle in manner thereinafter mentioned for the benefit of the Earl of Lincoln and his issue male after the decease of the Duke of Newcastle, for the residence and farther support of the *honour and dignity of the family in

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the descendants of the said Duke and the said Earl of Lincoln inheritable to the dukedom of Newcastle, and in consideration of the Duke's having engaged to settle for the like benefit of the said Earl certain messuages, lands and hereditaments in Aldborough in the county of York, of which he was seised in fee, and also his leasehold manor and lands of Newark in the county of Nottingham, holden by grant from the Crown, for the like benefit of the said Earl, as thereinafter mentioned, and for other considerations, the said Earl had agreed to join with the said Duke in suffering recoveries to bar the several estates and remainders in tail vested in the said Earl and to take effect on the decease of the Duke, and for settling the inheritance of the premises therein particularly mentioned in manner thereinafter expressed, in order to continue the same in their blood and family, the said Duke and Earl did thereby grant and convey certain estates in the counties of Nottingham, York, Middlesex and elsewhere, unto John Rayner and his heirs, to make him a tenant to the Præcipe, in order that recoveries might be suffered thereof, to enure, subject to the several annuities thereby granted, to the use of the Duke of Newcastle for life without impeachment of waste; remainder to the Earl of Lincoln for life; remainder to his first and other sons in tail male; remainder to Lord Thomas Pelham Clinton, second son of the said Henry Duke of Newcastle for life; remainder to his first and other sons successively in tail male; with divers remainders over; with a power to the Duke of Newcastle and the Earl of Lincoln jointly to revoke the uses declared and to appoint new uses; and with a power to the Duke of Newcastle of making leases; and the Duke

of Newcastle covenanted to convey the said manors and lands of Newark, that were granted by his present Majesty to the said Duke, to Sir John Shelly, to hold the same for the terms therein mentioned in trust for the said Henry Duke of Newcastle and his assigns for his life; and after his decease in trust for the said Earl of Lincoln for the term of his life; and after his decease in trust for the first and every other son and sons of the said Earl of Lincoln successively as far as the law would allow.

By indentures, dated the 19th and 20th of May, 1775, reciting, that upon a treaty of marriage it had been agreed, that the Duke of Newcastle and the Earl of Lincoln should revoke the uses declared by the indentures of 1772 concerning the premises thereby granted and released, and should limit, appoint and settle, the same to the *uses after mentioned; and that the Duke [*389] of Newcastle had not made any grant, assignment or transfer, of the lands at Newark to Sir John Shelly pursuant to the covenant in the indentures of 1772, it was agreed, that the said Duke should grant, assign, transfer and assure, the said manor of Newark and other the leasehold premises, held of the Crown, in trust to and for the benefit of such person and persons, and for such intents and purposes, as thereinafter expressed concerning the same; and it was witnessed, that the Duke of Newcastle and the Earl of Lincoln did thereby revoke the uses of the indentures of 1772; and in consideration of an intended marriage between the Earl of Lincoln and Lady Francis Seymour Conway and other considerations the said Duke of Newcastle and Earl of Lincoln did grant, release and confirm, several estates in the counties of Nottingham, York, Middlesex, Surrey, and Lincoln, to trustees and their heirs, after the said marriage, subject to certain rent-charges and terms for years, to the use of the Duke of Newcastle for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees for 1,000 years for securing portions for daughters and younger children; remainder to the Earl of Lincoln for life; remainder to the first and other sons of the said marriage successively in tail male; remainder to Lord Thomas Pelham Clinton, second son of the Duke of Newcastle, for life without impeachment of waste; remainder to his first and other sons

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successively in tail male; remainder to Lord John Pelham Clinton, third son of the Duke of Newcastle, for life, and to his first and other sons successively in tail male: remainder to the use of the first and other daughters of the Earl of Lincoln successively in tail; with divers remainders over; remainder to the Duke of Newcastle in fee; with powers to sell or exchange; and that the estates purchased or taken in exchange should be settled to the same uses, or as near thereto as the deaths of parties and other contingencies would admit; and the said Henry Duke of Newcastle did farther covenant with the said trustees, that he, his executors, administrators or assigns, would well and sufficiently transfer and assign to them the said manor of Newark and all the said leasehold premises, granted by his present Majesty to the said Duke by letters patent bearing date the 7th of February, 1761, and all the estate and interest, which the said Duke then had, or should have or be entitled to in the said leasehold premises, to hold to the said trustees, their executors, administrators and assigns, in trust for and for the benefit of such person and persons, and for such or the like estate and

[*390] estates, and for such or the *like ends, intents and purposes, as are thereinbefore mentioned of and concerning the said castles, honors, manors, messuages, lands, hereditaments and premises, thereinbefore limited and appointed and granted and released, as aforesaid, as far as the law in that case would allow and permit; and until such transfer that the said Duke, his executors, administrators and assigns, would permit the rents and profits of the said leasehold premises to be received by such person and persons as should under the limitations declared concerning the real estates from time to time be entitled to enjoy the same; with power to the Duke of Newcastle and the Earl of Lincoln to lease for twenty-one years at the most improved rents, &c.

The marriage took place. The Earl of Lincoln died in October, 1778; leaving issue of the said marriage one son, Henry Pelham Clinton, and one daughter, Catherine Pelham Clinton. The son died in September, 1779, without issue, being an infant of the age of nine months. Henry Duke of Newcastle died in February, 1794; and was succeeded in the title by his only surviving son, Lord Thomas Pelham Clinton; who died in May, 1795.

The bill was filed by Henry Duke of Newcastle, eldest son of Thomas Duke of Newcastle, by the Duchess of Newcastle his mother and next friend, among other purposes, to have the settlement of 1775, as far as respects the performance of the covenant to convey the leasehold manor and premises at Newark, established and carried into execution; and for that purpose the bill prayed, that it may be referred to the Master to settle a proper conveyance; and that such a clause may be inserted therein, as shall prevent the absolute vesting of the said leasehold property, until the persons successively entitled to the possession of the same shall have attained the age of twenty-one years; or that such other conveyance thereof may be made, as shall best give effect to the intention of the parties to the said settlement; and that the defendant Frances Countess of Lincoln may account for all sums of money received by her in respect of the rents and profits of the said leasehold manors and premises accrued since the death of Thomas Duke of Newcastle.

The defendants, the Countess of Lincoln and her daughter, Lady Catherine Pelham Clinton, by their answers insisted that upon the death of the Earl of Lincoln in 1778 his son, Henry Pelham Clinton, became entitled under the said settlement and the covenant of his * grandfather the Duke of Newcastle to have [*391] the manor of Newark and the other leasehold premises assigned to or in trust for him, his executors, administrators, and assigns, expectant on the death of his said grandfather, absolutely and for his and their own use and benefit; and that upon his death the Countess of Lincoln became entitled as his administratrix in trust for herself and her said daughter, as the only next of kin of the said Henry Pelham Clinton, in equal moieties.

The Countess of Lincoln was in possession of the said leasehold premises under an assignment by the executors of Henry Duke of Newcastle.

Solicitor-General, *Mr. Lloyd*, *Mr. Galley*, and *Mr. Sutton*, for the plaintiff; and *Mr. Richards*, for Lord Thomas Pelham Clinton and his sister, entitled in remainder under the settlement:

This being merely a minute of an agreement to be executed by a subsequent conveyance is to be construed very differently from

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an actual conveyance, or even a limitation by will. * * * [They cited *Stanley* v. *Leigh*, 2 P. Wms. 689; *Gower* v. *Grosvenor*, 3 Barnard, 54; *Trafford* v. *Trafford*, 3 Atk. 347; and other cases.]

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Attorney-General, *Mr. Mansfield*, and *Mr. Romilly*, for the defendants, Lady Lincoln and her daughter:

The settlement of 1772 does not mention any purpose as to the manor of Newark to continue it in the blood of the family; as it does as to one class of real estates; the uses of which embrace all the younger branches of the family: but the purpose as to the Newark property is confined to the benefit of the Earl of Lincoln and his issue male; having no limitation for the benefit of the younger branches. * * * [They cited *Vaughan* v. *Burslem*, 3 Br. C. C. 101; *Foley* v. *Burnett*, 1 Br. C. C. 274 *Highway* v. *Banner*, 1 Br. C. C. 584; and other cases.]

[395] Reply. * * *

[397] LORD CHANCELLOR:

June 3. The question arises upon the leasehold property at Newark; which by the articles made upon the marriage was to be settled in the same manner as the freehold estates, as far as the rules of law would permit.

I mean to be extremely short in stating my opinion; which is decidedly, that in cases of marriage articles, where leasehold property is to be the subject of a settlement of freehold estate, and the limitations of the freehold go to all the sons in succession, the settlement to be made of the leasehold is to be analogous to that of the freehold; so that no child born, and not attaining the age of twenty-one, shall by his birth attain a vested interest, to transmit it to his representatives, and thereby defeat the ulterior objects of the articles; which are not decidedly in favour of one son; but equally extended to every son; and that I take from all the course of the cases to be the settled rule and established practice. Sir JOSEPH JEKYLL in * *Stanley* v. *Leigh*, I dare say after great consideration, lays it down, that he understood at that time that to be the course, where there were articles for a settlement of leasehold estate. Nothing is more reasonable; for by adhering literally and verbally to the words the estate in the

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deed executed would defeat the view of the parties and frustrate their purpose in making the settlement. Admitting in the argument, that if the subject of the articles was freehold estate and the articles were so drawn as to give an estate to the heirs of the body of the father, it would be impossible that he should be tenant in tail, but he must be reduced to an estate for life; in parity of reasoning it is impossible in this case to give a vested interest to a son upon his birth. The reason, I discuss the less upon this, is, that the argument referred to Mr. Fearne's second volume, p. 482; where all the cases are so extremely well stated, and in so satisfactory a manner, that I cannot do better than refer to it.

I had a little doubt upon the argument, "Why do not you go farther; for you do not carry on the analogy strictly; for if you vest it in a child attaining the age of twenty-one, the limitation of the freehold estate would endure much farther." I find, that has been done in a private Act of Parliament; but I hardly think myself warranted to follow that. That was a private Act to sell some estates and purchase others; and in the estates to be purchased there was a considerable quantity of leasehold property, extremely convenient to the occupation of the freehold, because it consisted of tithes over freehold estates; and the Judges admitted a clause, that the leasehold estates were to go to the persons entitled to the freehold until some person entitled to an estate-tail in the freehold shall have acquired the fee-simple. I think myself not warranted to go to that extent: but I think, there is no objection to making the limitation, as it was intended in the Act of Parliament that was prepared to settle the Newark property; that no person shall be entitled to the absolute property, unless he shall attain the age of twenty-one years, or die under that age, leaving issue male.

[Upon Appeal to the House of Lords in 1806 (reported 12 Ves. 217), the plaintiff in the original action having attained twenty-one, it was decreed that the leasehold estates vested absolutely in him, the subsequent limitations, defining the events by which his interest might have been defeated, were accordingly struck out as unnecessary.]

[12 Ves. 217 —239]

1797.
June 21, 23, 26.

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(3 Vesey, 402—420.)

Testator by codicil in 1776 reciting, that he had devised his real estate by his last will, dated 25th November, 1752, charged his real estates with his debts, and legacies given by the codicil, and appointed executors: the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil; stating, that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator by the death of the other party was bound, if not in law, in honour; and did not mean to revoke the will of 1756 and revive that of 1752; and praying, that the will of 1756 and the codicil might be established, the trusts carried into execution, and the legacy paid: upon an issue directed the will of 1752 was established; evidence of mistake being rejected: on farther directions the plaintiffs relied on the agreement, and offered evidence in support of it. The bill was dismissed; the LORD CHANCELLOR being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received; and that upon the evidence the agreement was uncertain and unfair, and therefore not to be executed.

SIR ROBERT WALPOLE, the first Earl of Orford, had three sons: Robert, who upon his father's death succeeded to the title; Sir Edward Walpole, and Horatio Walpole. He had two daughters: Mary and Maria. The former in 1723 married George afterwards Lord Cholmondeley, and died in 1732, leaving Lord Malpas her eldest son, father of the present Lord Cholmondeley. His other daughter Maria married Charles Churchill. Robert the second Earl of Orford died, leaving an only son, George, the third Earl.

Horatio, afterwards created Baron Walpole of Woolterton, brother of the first Earl of Orford, had four sons: Horatio, Thomas, Richard, and Robert.

The first Earl of Orford had also two sisters: Dorothy and Susannah. The former married Viscount Townshend, and left issue four sons: George, Augustus, Horatio, and Edward. Susannah married Anthony Hammond; and they left issue, three sons: Richard, Robert, and Horatio.

George, Earl of Orford, by a will, dated the 25th of November,

* *Denyssen* v. *Mostert* (1872) L. R. 4 P. C. 236, 253, 41 L. J. P. C. 41.

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1752, devised all his manors, lands, tenements, and hereditaments * in the county of Norfolk (except the lands limited in jointure to the Countess Dowager, and certain estates, mortgaged by his father to Thomas Walker) to John Harris and Thomas Crewys and their heirs, to the following uses: viz. to the use of the testator's first and other sons successively in tail male; remainder to his uncle Sir Edward Walpole for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to the testator's uncle Horatio for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to Lord Malpas, eldest son of George Earl of Cholmondeley, for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to Robert Cholmondeley, second son of the Earl of Cholmondeley, for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to Lady Maria Churchill for life; remainder to trustees to preserve contingent remainders; remainder to her first and other sons successively in tail male; remainder to the testator's great uncle Horatio (afterwards created Baron Walpole of Woolterton), for life; remainder to trustees to preserve contingent remainders; remainder to his eldest son Horatio for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; with similar limitations in strict settlement to Thomas, Richard, and Robert Walpole, and their issue male respectively; remainder to all and every other the sons of the testator's great uncle Horatio successively in tail male; remainder to George Townshend for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; with similar limitations in strict settlement to Augustus, Horatio, and Edward, Townshend, and their issue male, and to Richard, Robert, and Horatio, Hammond, and their issue male, respectively; and in default of such issue, to the use of the testator's right heirs; with a condition to oblige the Townshends and Hammonds, when in possession, to use the surname of Walpole and bear the arms of

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that family; and a power to the tenants for life of making jointures, and of leasing for twenty-one years, with an exception of the mansion-house of Houghton.

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*By another will, dated the 31st of March, 1756, Lord Orford devised all his manors, lands, and hereditaments, in the county of Norfolk, with the same exception as in the former will, to John Harris and Henry Crewys and their heirs; and declared uses, which were precisely the same as those expressed in the former will; except that the family of Lord Cholmondeley were postponed to the family of the testator's great uncle Horatio; the latter being introduced immediately after the limitations to the issue male of the testator's uncle Horatio; and there was no limitation to Augustus Townshend and his issue male; † and the estate for life to Robert Hammond, who was then dead, was omitted. This will contained the same powers of jointuring and leasing, and the same obligation upon the Townshends and Hammonds to take the name and arms of the Walpole family, as were expressed in the former will.

Horatio, afterwards Lord Walpole, great uncle of the testator Lord Orford, by a codicil, dated the 31st of March, 1756, confirmed the settlement made upon the marriage of his eldest son; and subject thereto devised all his estates, in the said settlement comprised, to his eldest son Horatio for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; with similar limitations in strict settlement to the testator's sons Thomas, Richard, and Robert, and their issue male successively; then in the same manner to George Earl of Orford and his issue male, to Sir Edward Walpole and his issue male, to Horatio Walpole (uncle of Lord Orford) and his issue male; then to Lord Malpas and the rest of the family of Lord Cholmondeley, Lady Maria Churchill, the families of the Townshends and Hammonds in the same order and language as in Lord Orford's will of the same date; and in default of such issue to the testator's right heirs; with the same condition upon the Townshends and Hammonds to take the name and arms of the Walpole family,

† It was supposed that he died without issue male before the execution of this will.

and the same powers of jointuring and leasing, as were expressed in Lord Orford's will of the same date.

The testator Horatio Lord Walpole died in January, 1757; and was succeeded in the title by his eldest son Horatio.

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Lord Orford's codicil, dated the 4th of December, 1776.

"I George Earl of Orford do this 4th day of December 1776 make this codicil to my last will and testament as follows Whereas I have made my last will and testament dated the 25th day of November 1752 and duly signed and published the same whereby I have devised all my real estate to certain uses but have not charged the same with the payment of my debts nor any legacies nor disposed of my personal estate nor appointed any executor now I do hereby declare this writing to be a codicil to my said will and to be accepted and taken as part thereof as fully and effectually to all intents and purposes as if the same had been actually inserted therein and I do by this my codicil revoke my said will so far only as the same is incompatible herewith and therefore I subject all my real and personal estate whatsoever and wheresoever to the payment of all my just debts and legacies hereinafter mentioned and set down and my funeral expenses and for effectuating the payment thereof I give devise and bequeath all my said real and personal estate to be sold." The testator then directed and empowered four persons, whom he afterwards appointed executors, as soon as conveniently might be after his decease, to sell the same, or such part as they should think proper and necessary, for the payment of all his debts, legacies and funeral expenses, and by the produce of the sale to pay the same; and he directed, that his Houghton and Castle Rising estates should be sold last, and only in case of a deficiency of assets by sale of the residue of his estate for the purposes aforesaid. He then gave a legacy of 5,000*l.* to Mrs. Martha Tuck, 10,000*l.* to Horatio Walpole of Woolterton, eldest son of Lord Walpole, and some other legacies; "and subject to the devises and bequests in my codicil I do hereby ratify and confirm all and every the gifts and devises in and by my said will made or given not hereby altered or revoked."

This codicil was attested by three witnesses thus: "This writing was signed and sealed by the above-named George Earl

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of Orford and by him published and declared as and for a codicil to his last will and testament in the presence of us" &c.

Sir Edward Walpole died without issue in the life of Lord Orford.

[406] Lord Orford died in December, 1791, without having been ever married; and was succeeded in the title by his uncle Horatio; who entered upon the devised estates; and to whom as heir at law other estates descended.

The bill was filed by Horatio Lord Walpole, claiming under the will of George Earl of Orford, executed in 1756, as tenant for life in remainder after the death of Horatio Lord Orford, and by Horatio Walpole, eldest son of Lord Walpole, on behalf of himself and the other legatees of Lord Orford, and also claiming as tenant in tail expectant upon the death of his father, against Lord Cholmondeley, Lord Orford, and the executors of George Earl of Orford; praying, that the will of George, late Earl of Orford, dated the 31st of March, 1756, and his codicil, dated the 4th of December, 1776, as a codicil to the said will, may be established, and the trusts thereof carried into execution; then praying the usual accounts; and that, if the personal estate should not be sufficient for the debts, legacies, &c., the deficiency may be raised from the testator's real estates; and that the plaintiff Horatio Walpole may be paid his legacy of 10,000*l.* with interest.

The bill stated, that George Earl of Orford and Horatio, afterwards Lord Walpole, his great uncle, about the beginning of the year 1756 agreed with each other to settle the principal parts of their respective estates in the county of Norfolk in such manner that the said Horatio, afterwards Lord Walpole, and the issue male of his body should take the Orford estates, (except the estates in jointure and those comprised in the mortgage to Walker,) before any of the issue female of the first Lord Orford; and that the issue male of the first Lord Orford should take the estates of the said Horatio Walpole before any of his own issue female: so that upon failure of the issue male of the body either of the said first Earl of Orford or of the said Horatio Walpole, his brother, the estate of that branch of the family, whose issue male should so fail, might go to the issue male of the other branch; and that the two estates might thereafter be

enjoyed together. The bill then stated, that in pursuance of the said agreement and in order to carry the same into execution the will of Lord Orford, dated the 31st of March, 1756, and the codicil of Horatio, afterwards Lord Walpole, of the same date, were prepared and executed; that *Horatio Lord Walpole died in 1757 without having revoked his codicil; by means whereof the limitations thereof took effect; and therefore the late Lord Orford was bound and deemed himself bound by the agreement he had made with the said Horatio Lord Walpole; and if Lord Orford was not in law bound by such agreement, he was in honour bound thereby, and considered himself as bound thereby. The bill charged, that the testator Lord Orford did not by his codicil mean to revive or set up the will of 1752 or in any wise to change or alter the limitations of his estates made by his last will, dated the 31st of March, 1756; but meant only to charge his real estates with the payment of his debts and legacies, and to dispose of his personal estate, and to appoint executors; and that the date of his last will and testament was mistakenly inserted in the said codicil; and that the said codicil was meant to be and is in fact by the said testator declared to be a codicil to his last will; and that notwithstanding the mistake of a date in the recital of the said codicil the testator in fact meant thereby to refer to his last will and testament; which last will and testament bore date the 31st of March, 1756; the instrument bearing date the 25th of November, 1752, having been revoked by the said will of the 31st of March, 1756.

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Lord Cholmondeley by his answer stated, that he did not know or believe, that Lord Orford did at any time become bound or consider himself bound in law or equity or in point of honour to the performance of any agreement mentioned in the bill, or of any agreement whatever, in relation to the disposition of all or any part of his estates in favour of the male issue of Horatio Lord Walpole or of any person or persons whatever to the prejudice of all or any person or persons named in the will of 1752.

All the instruments were proved; and it appeared, that Lord Orford's will of the 31st March, 1756, and Lord Walpole's codicil of the same date were attested by the same witnesses. The plaintiffs offered evidence, that both those instruments were

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laid before the same counsel, and were executed at the house of the plaintiff Lord Walpole at the same time; and that at the time of execution Lord Orford said to Richard Capper, Esq. one of the subscribing witnesses, that his uncle and he had made reciprocal limitations in the said instruments in favour of each of their families in case of failure of issue of either of them; they also offered *letters of the testator Lord Orford and parol evidence to prove Lord Orford's friendship and regard for the Woolterton family, and that he was not intimate with the family of Lord Cholmondeley.

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The evidence offered by the defendants was to the following effect:

Charles Lucas, who was employed by the testator Lord Orford as solicitor, deposed to several conversations between him and the testator, in which the latter shewed great anxiety that his estate should go to the right heirs.

Carlos Cony, steward of the testator Lord Orford, deposed, that in 1776 the said testator directed the deponent to prepare a codicil to his will. The deponent saying, it would be proper for him to have the will, the testator said, his will was in the hands of Mr. Moone; and he gave the deponent a letter to Mr. Moone directing him to deliver his will to the deponent. In consequence of that letter the will of the 25th of November, 1752, was delivered to the deponent in May, 1776, by Moone. The will remained in the deponent's possession for several months. The deponent having prepared the codicil attended the testator with it at his house at Eriswell in November, 1776, or January, 1777. Blanks were left for the names of the executors and trustees and for legacies by the testator's directions. The testator read or appeared to read the codicil. The blanks were filled up in the testator's hand-writing. At the time of giving instructions for the codicil the testator did not inform the deponent, that he meant to revoke any disposition he had made by his will of his real estate, or to change any of the limitations or to alter the line of succession in which the same would go, as his will then stood; nor did he give any instructions to make any alteration in the limitations of his real estates farther than to make them

subject to the payment of his debts, legacies and funeral expenses. During the testator's second derangement the deponent went to Eriswell, and asked Mrs. Tuck for the testator's will and codicil; and he annexed them together and sealed them up: he believed the will then delivered to him was the will he had received from Moone.

William Moone confirmed the evidence of Cony, as far as it related to the delivery to him of the will of 1752; and deposed, *that the said will was committed to the custody of the deponent immediately after it was executed; and it remained in his custody above twenty years. [*409]

Richard Gardiner deposed, that the testator being at his house at Eriswell shortly before his death said to the deponent: "I desire you will take charge of my papers of my will in this house; as upon those depend the succession of my family to my property." The testator then said, he had named executors, and had given and bequeathed 10,000*l.* to Colonel Walpole, and 5,000*l.* to Mrs. Tuck (which he said was lapsed by her death), and that he had also left something to his servants. A few days afterwards the testator had a fall from his horse; and being confined to his bed at Brandon, where the accident happened, and not likely to return to Eriswell for some time, the deponent went to Eriswell to secure the testator's will and codicil: which he thought unsafe in the common drawer of a bureau; and he brought away the parcel, which contained the said will and codicil; and deposited the same in the iron chest in the steward's office at Houghton; where they were found at the death of the testator. The instruments so deposited were the will of 1752 and the codicil of 1776.

Daniel Potter deposed, that about two years before the execution of the codicil the testator became insane, and continued so about a year; and some few months after the execution of the codicil he again became insane; and continued so for some months.

By an order made upon the hearing of this cause on the 26th of November, 1795, and a subsequent order made on the 6th of February, 1796, the LORD CHANCELLOR directed the following

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issues to the Court of Common Pleas: 1st, Whether George, late Earl of Orford, devised to the defendant, the Earl of Cholmondeley, an estate in tail male in remainder expectant immediately after the death of the defendant, the Earl of Orford and failure of sons or a son of his body and of issue male of the bodies or body of such sons or son; 2ndly, Whether the said testator devised an estate for life in remainder to the plaintiff Lord Walpole expectant immediately after the death of the said defendant, the Earl of *Orford and failure of sons or a son of his body and of issue male of the bodies or body of such sons or son.

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In Easter Term, 1796, the first issue came on to be tried at the bar of the Court of Common Pleas; when the Court being of opinion, that the evidence offered on the part of Lord Walpole, the defendant in that issue, to shew the testator Lord Orford did not intend by the codicil of 1776 to revoke the will of 1756 and set up the will of 1752, could not be received, a bill of exceptions was tendered, which the Court allowed. A verdict was found for the plaintiff Lord Cholmondeley; and the other issue was withdrawn.

In Hilary Term, 1797, the exceptions were argued in the Court of King's Bench; which Court concurred in opinion with the Court of Common Pleas.†

Before the cause came on upon the equity reserved, the defendant Lord Orford died without issue. The question made for the plaintiffs, when the cause came on upon the equity reserved was, whether taking the codicil to be a revocation of the will of 1756, it was not executed in fraud of that contract, in pursuance of which the plaintiff contended that will was executed; to prove which they offered to read the evidence of Mr. Capper.

Attorney-General, for the defendant Lord Cholmondeley, objected to the evidence.

Solicitor-General, for the plaintiffs:

Rockwood v. *Rockwood*, Cro. Eliz. 163, 1 Leon. 192; *Thynn* v. *Thynn*, 1 Vern. 296; *Devenish* v. *Baynes*, Pre. Ch. 3; *Chamberlaine* v. *Chamberlaine*, 2 Freem. 34; 2 Eq. Ca. Ab. 43,

† 7 Term Rep. B. R. 138.

cited Pre. Ch. 3. Here is a promise made in consideration of a will made in a particular manner; which took effect. The principle is considered by Lord NOTTINGHAM as established. In *Berenger* v. *Berenger*, Lord Nottingham's MSS., the testator's son promised to pay his sister a sum of money at the end of three years, and to support her in the meantime. That was not a case upon a will, but upon forbearing to make a disposition by will, which would have the effect of making a provision for a daughter out of an *estate, which was suffered to descend to [*411] the son. *Reech* v. *Kennegal*, 1 Ves. Sen. 123; 1 Wils. 227; Amb. 67.

Attorney-General, for the defendant:

The bill considers the land directly and specifically bound according to the will of 1756. They now admit, that will could be defeated by a codicil by bringing charges upon it to the amount of the whole value. If the estate was bound, it could no more be affected by codicil than by act *inter vivos*. The case they now offer to prove, it is not within the scope of their bill to be at liberty to prove: if it was, parol evidence cannot be admitted, where two writings do not refer upon the face of them to each other, to shew they contain a binding agreement upon the land. The Statute of Frauds is at an end, if under the name of an agreement a thing may be made a devise, or under the name of a devise an agreement, which is not either according to that Statute. As to the cases, where upon the head of fraud evidence has been admitted, the bill must allege a fraud practised, and that it was done in consequence of that fraud. *Devenish* v. *Baynes*, the only case in which land was bound, turned upon the custom of the country; by which the estate could be created by parol; therefore they let in evidence. In other cases it was personal estate; and the Court studiously decreed, that the individual who had defrauded the testator, should out of his funds make good the promise; and reserved the question, whether he could come upon the assets, which the testator had intended to affect. In *Reech* v. *Kennegal* Lord HARDWICKE was very cautious as to the evidence; and went upon the denial in the answer not being sufficient.

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LORD CHANCELLOR:

How am I to comply with the prayer of this bill? I must declare, that the devisees taking under the codicil of 1776 shall be trustees for the persons taking under the will of 1756. Then I cannot possibly receive parol evidence. There is another difficulty, not applying to the point of evidence: how can I make that decree upon this bill; which desires me to give effect to the codicil; for the court of law has told me the effect of the codicil? It has said, the will of 1756 cannot be incorporated into the will of 1776. According to the verdict I can only execute the will of 1776, containing in it the will of 1752. It comes back strongly to the question of evidence. The court of law has told me, that
[*412] the will of 1756 is gone. You now want *upon a stated case of contract to make the devisee under the will of 1776 a trustee; (I should direct him to convey, if the contract is good) and you attempt to do that by parol testimony.

For the Plaintiffs:

The evidence ought to be read upon the ground that takes every case out of the statute: a contract performed on one side in a manner that makes it irrevocable.

The evidence was read *de bene esse*.

Solicitor-General, *Mr. Mansfield*, *Mr. Graham*, and *Mr. Alexander*, for the plaintiffs:

No proposition is better settled than that a contract to leave by will is good: *Goilmere* v. *Battison*, 1 Vern. 48. This is a contract to make mutual wills. A case of that kind and very similar to this was decided by Lord CAMDEN in favour of such an agreement: *Dufour* v. *Pereira*, in Chancery, 18th July, 1769. We read the notes, from which Lord CAMDEN pronounced his judgment. His lordship referred to the cases that have been cited for admitting the evidence; which tend strongly to confirm his opinion: and though there were in that case circumstances of acquiescence by proving the will and receiving the legacy under it, the judgment was pronounced upon the other ground. It may be objected, that this is a contract in its nature revocable.

It is not revocable at all times, but only during the joint lives with notice; and after the death of either it becomes irrevocable. Lord CAMDEN observes upon that, that when an instrument of this nature is executed, and there is any engagement not to revoke it, a covenant for instance, there can be no doubt, the assets would be responsible; and where it is an engagement of a different description, if from the nature of the transaction an agreement not to revoke must of necessity be implied, it is precisely the same thing. But without authority the Court would reject that construction, which is big with fraud. Suppose, the consideration had been 50,000*l.* paid down: would there be any doubt of relief? It would be the same, if the consideration had been a deed executed. Then what is the difference between that case and an instrument becoming irrevocable by the acquiescence of Lord Orford. This is not a case of part performance only; though that would do: but here the agreement is executed. The instruments themselves prove the contract, as Lord CAMDEN says in the case before him. Is it by accident that they are attested *by the same witnesses, executed upon the same day, and contain the same covenants? As to the form of the bill, it does not specifically pray the relief we now ask, because we had great reliance on the other point: but the case is stated in the bill; and then the practice is to give the relief under the general prayer, provided there is no surprise on the defendants, that they lose no evidence, and suffer no inconvenience by it. [*413]

Attorney-General, *Mr. Lloyd*, and *Mr. Stratford*, for the defendants:

Under the prayer for general relief the plaintiffs cannot have a relief that is inconsistent with the case made by the bill. They adopt this in the bill as an engagement of honour merely; and they go on to claim under the codicil. Nobody claiming under the codicil can dispute the will of 1752, which is now the legal will. It is impossible for them to claim anything in this Court under the codicil, not admitting the whole effect of it. If they state the codicil as a fraud upon a valid agreement in 1756, they must abandon the codicil. They are driven therefore to give up all the relief prayed as legatees. The bill ought therefore to

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have been of a totally different nature. It is an invariable rule, that nothing can be introduced into a cause that is not put in issue.

As to the merits, the circumstances afford no ground for relief. The very nature of the relief breaks in so much upon the security of property, that they are bound to state, what was the contract. If the evidence was admissible, it is not sufficient to prove such a contract in opposition to the circumstances; that Mr. Walpole was a very old man with four sons, a family established so that in all probability the number would not be increased, and who died in the very beginning of the next year; that Lord Orford was a young man, likely to have children, likely to be in a great situation in the world; in a way likely to incur debts; who in fact lived many years. Lord Orford must be supposed to have agreed, that, having wholly set aside daughters and sons of daughters, he should make no provision out of those estates for younger children; that he should make no jointure; and your Lordship must say farther, that he could not contract debts, so as to bind these estates; or if he did, that he would make himself answerable out of other assets to make
[*414] good to the persons claiming *under the contract all, that his wife, children, and creditors, should take out of the estates that were the subject of the contract. It must be admitted, he might with notice have got rid of a contract so oppressive and of such gross inequality. If a person chooses an engagement of honour instead of a legal contract, where is the equity? The Court is to suppose an engagement to leave these estates, not only to the Walpoles and the Cholmondeleys, but to all the others, the Townshends and the Hammonds. If it had been by deed, no professional man would have permitted it to be done without a power of revocation inserted: if by will, it would not be inserted, only because the law gives a power of revocation. Saying, he was not at liberty to revoke without notice, admits, that he had power to revoke: then how is it proved, that he could not without notice? That is a most important term in the agreement. I admit there may be agreements mutually to leave, according to the case before Lord Camden: but your lordship is bound to see, that you have evidence according to the law

of the land, that such a contract was in fact entered into. Lord CAMDEN put it upon this; that that instrument was a contract. He decides it upon the foot of contract. The evidence of Mr. Capper does not come up to the agreement stated in the bill. The declaration, he proves, is that Lord Orford and Mr. Walpole had made limitations in favour of each of their families in failure of issue of either of them, not in favour of the males of each of their families in exclusion of the females; and that it was done by will; which it was in the power of either to revoke. The circumstances of the will of Lord Orford and the codicil of Mr. Walpole being laid before the same Counsel and made at the same time are too vague for the Court to act upon. Upon the Statute of Frauds I repeat, that there is no case as to land but *Devenish* v. *Baynes*. At that time the law of the Court was not settled: 2ndly, It might be upon the circumstance, that by the custom the legal estate might be created by parol; besides the agreement was distinctly proved in that and every other case. The point there and in *Chamberlaine* v. *Chamberlaine* was, whether A. by the representation of B. was fraudulently prevented from making that disposition of his property that he was then in the act of making, and that was also the question in *Olmius* v. *Lady Waltham*.

In *Goylmer* v. *Paddiston*, 1 Eq. Ca. Ab. 17, 2 Vent. 353, the agreement was collateral in consideration of a marriage, which was had in consideration of that agreement. [415]

Reply:

Lord Cholmondeley's answer, that he does not know of such agreement, shews it was in issue. The fact of the contract being established, the Court must determine the extent of it; and the real foundation of the objection must be that the extent of the obligation cannot be drawn by the Court. A considerable degree of uncertainty might have arisen upon the agreement in 1 Eq. Ca. Ab. and 2 Ventris. In *Dufour* v. *Pereira*,* suppose, after the mutual wills were executed, either the testator or testatrix had become embarrassed, and had been obliged to part with some of the property; this sort of instrument must be considered as

* 1 Dick. 419.

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operating only upon what should be left. The only part of the prayer, that can be considered inconsistent, is that the legacies shall take effect. If there is another fund, there is no inconsistency.

LORD CHANCELLOR:

The prayer of this bill is for payment of legacies. The bill is brought by Mr. Walpole, a legatee on behalf of himself and all other legatees. Lord Walpole joins with the plaintiff Mr. Walpole, and makes himself co-plaintiff, claiming as devisee of the estate, and for the purpose of having the other funds, which are first applicable, applied in payment of the legacies, in order to have the estate clear. The case made by the bill states a will of 1752, another will of 1756, and a codicil of 1776, by which the legacies are given. The bill insists, that the codicil refers to the will last in date; under which Lord Walpole claims part of the real estates; and as I conceive upon the form of the bill, as an inducement to that conclusion the bill recites an agreement, and reciting the fact of an agreement and the steps, that were taken in pursuance of it, concludes that the testator was bound in honour, not bound in law, not bound in equity, to adopt that will made in pursuance of the agreement to make reciprocal limitations. The agreement appears to be introduced into the bill to that effect only; and in the manner of it not quarrelling with the codicil, the bill affirms Lord Orford's power to devise; and contends, that he had devised by the will of 1756 and the codicil of 1776 in favour of Lord Walpole and the legatee. That question contested by Lord Cholmondeley claiming under the
[*416] will * of 1752 has gone to the proper jurisdiction, a Court of Law; and it has been decided, that the only disposition made by testament is comprised in the will of 1752 and the codicil of 1776; which united make but one instrument. The inevitable consequence upon this bill is, that no legatee of Lord Orford can claim against that disposition. The will of 1752 is by necessary conclusion a part of the codicil of 1776. Mr. Walpole therefore is a suitor in this Court upon his own part and in behalf of the legatees; and in that character only he stands before me. Lord Walpole stands before me only in the character of devisee of the

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estate, and desiring the application of the prior funds, in order to have the estate disencumbered. Lord Walpole's claim as devisee under the will of 1756 has been negatived by the determination at law; then I can only tell him, consistently with the determination at law, that he is no devisee. The plaintiffs cannot claim by virtue of a will revoked against a subsequent will, that has been established. They cannot insist, that the testator had no right to devise to the whole extent of the will of 1752, claiming under the codicil, a part of the devise; which must be taken together and entire. The prayer is entirely adapted to that case; and it is perfectly of course after the decision at law, what answer I must give to the specific relief: then, whatever latitude the Court takes upon the prayer for general relief, no relief can be given upon it, that is inconsistent with the specific relief prayed, and that does not apply to the case made by the will.

Great stress was laid, and very properly laid, upon *Dufour* v. *Pereira*,† with the authority of a very ingenious and eloquent opinion of Lord CAMDEN upon general grounds. That case is in most of the circumstances, and certainly in the form of the bill, the very opposite of this. The bill stated an agreement in writing contained in an instrument conceived in the form of a will of persons not conversant in the laws of this kingdom, made before a notary public; an agreement perfectly defined with minuteness upon all cases that could be supposed to occur. The bill prayed performance; and in consequence of the agreement it was contended, that all the effects that existed were specifically bound; and it prayed a transfer of the specific stocks, that were the subject of it, and not disposed of, according to that mutual agreement. In that bill the two plaintiffs, the daughters of the defendant, did not claim any benefit whatever under the will of * Mrs. Reyne the grandmother, but against the will made by her [*417] and proved as her last will. The mutual will had been proved after the death of Mrs. Reyne: but it was only proved as the will of Mr. Reyne. In the provisions of that testamentary agreement they had made, which is not very common, a substitution of executors. The survivor was to be the executor; and upon

† 1 Dick. 419.

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the death of the survivor there is a nomination of three persons to come in as a substitution of executors; and one of them, who was alive upon the death of Mrs. Reyne, who had made her will against the mutual will, was admitted to prove it, not as her will, but as the will of Mr. Reyne, as his legal representative. Mrs. Reyne's will was also proved as her will in the Ecclesiastical Court. In the view of the Court therefore the mutual will neither was nor by possibility could be considered as the will of Mrs. Reyne. It was considered purely as the will of her husband. There was no probate of it as her will: but on the contrary the will, she made, was proved. Therefore the Court considered it not as her testament, but as a contract with her husband for valuable consideration; under which she acted for sixteen or seventeen years; that she had taken the benefit of it for her whole life. Therefore she had accepted the terms; and had bound herself to the conditions under which all the property was given by the will of her husband. The will states, that according to the law of this country she had no separate property. All the property was in common between her and her husband. There was stock in the name of each: 4,000*l.* was left by Mr. Detudor at her own disposal, not to her separate use. That was stated by the bill as the property of the husband; as it certainly was. The bill states, therefore, that all the property, she had enjoyed from the death of the husband, was the property of the husband. The answer does not deny it, or insist, that any property was to her separate use, but only puts it upon this, that upon the death of the husband that property was not bound by his will, because the stock was not transferred into his own name; that it was a chose in action not reduced into possession. The effect of the agreement was, that the wife had the enjoyment during life, and limited to that, of all the specific interests; she had a limited power of disposing of part of that property: but all she had was upon condition, that she should dispose of her own property, that she might have acquired after his death (and she did increase it), upon the
[*418] dispositions of that will. Suppose, she had rejected *instead of proving the will of her husband, and had property distinct from that subject to the operation of this contract, and an attempt had

been made to bind her by it: I do not apprehend, that Lord CAMDEN would have said, that merely by the chance of her surviving she a *fême covert* would have been bound by the contract with her husband. I was counsel in that case; and remember particularly the argument: but I happen to have taken no note of Lord CAMDEN's opinion; which has been cited by the *Solicitor-General* from a very accurate note. The style of it convinces me, it was perfectly his own. The scope of the argument was, that the whole family was living near Geneva. The counsel for the defendant contended, they had acted upon the idea of a foreign law; and they state, that according to the law of that country the situation of husband and wife is perfectly different from their situation by the law of England; and with a view to that this engagement was made; that the husband there had no interest in the property of his wife: her property *de jure* is separated from his; he has no interest in it, but the administration *stante matrimonio;* that upon the death of the wife all his interest ceases; and it goes to the children, or to her relations; and in the same manner upon the death of the husband his property goes to the children, and if there are no children, to his relations. They also contended, that there is another maxim, that any donation between them *stante matrimonio* is of no avail; therefore the constant practice was to make mutual wills: but it was also contended, that mutual wills required confirmation by the survivor; and then it was efficacious. The discussion upon the reasonableness of that law occupied a considerable part of the argument. Lord CAMDEN was very properly of opinion, that he must judge according to the law of England, where they had long resided; and taking it to be very advantageous to the surviving party he determined, that she was bound; and that her husband's will must rule her's; she having enjoyed all the benefit; and the will being perfectly defined. It was a most minute, distinct and particular, engagement to each other what shall be done after the death of each and of the survivor. It goes even to the specification of what legacies they might give, and of the disposition of plate, watches, jewels and trinkets. Some legacies are to be paid upon the first death: others upon that of the survivor: some

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directions are given as to charitable legacies. Lord CAMDEN's argument applied to the objections that might be raised by the * defendant. I do not dispute his principles. They are very just, where they apply.

These plaintiffs now insist upon the agreement, which they state. As to the extent of it, it does not exist any where so that I can see, what they agreed to: but the fact of some agreement is to be implied from the cotemporary execution of the two instruments and the other circumstances. From the co-existence of the instruments and the execution at the same time I do infer, that they had agreed to make, the one a codicil, the other a will. I conclude with the bill, that both considered it an honourable engagement. I cannot direct the execution of an honourable engagement; that leaves the party to dispose as he pleases; which rests upon nicer points than a Court of justice can decide upon. I must say, they meant to impose upon each other a legal and binding obligation; that that was their intention, and they meant to do so. I adopt what the *Attorney-General* said with great force: if they meant to bind themselves, and by a more formal and efficacious instrument than a will, I do not apprehend, any man of honour in the profession would have suffered Lord Orford to execute this agreement without a power of revocation inserted; for it would have been a most absurd deed for him to execute without giving himself a larger latitude to consider what he should do for his own issue female. It would have been by no means consistent with the mutual honour of the two parties to suffer him so to bind himself: for the remainder in the one will was worth nothing; that in the other, as these contingent interests are valued, was infinitely more valuable. But the obligation upon Lord Orford to bind himself strictly and in legal form according to the tenor of the will executed would have reduced him in many possible and probable instances of his life to great difficulty and distress. Marriage was in his contemplation. His daughters would have been totally set aside according to the engagement. Therefore in the supposed situation of the parties and the supposed arrangement it was not consistent with their honour to have this rest upon any more than that agreement, to be left *ad arbitrium* with that

tie upon the mind. Choosing to do it by will, it is a wide conclusion for me to draw, that if the parties had been to express their agreement, it would have been in terms to make it finally binding upon each and irrevocable. But * for this Court to execute an agreement it is always necessary, that the terms should be clear. Here it is uncertain, whether they meant it to amount to a legal obligation. There is no evidence, nothing upon which I can obtain a clear and defined solution of that; and I lay it down as a general proposition, to which I know no limitation, that all agreements in order to be executed in this Court must be certain and defined: secondly, they must be equal and fair; for this Court, unless they are fair, will not execute them: and thirdly, they must be proved in such manner as the law requires. Upon a bill properly framed all these points would occur; and upon such a bill the defendant would undoubtedly have the benefit of demurring. It is enough for me to say, I doubt upon every one of these points. There is great uncertainty with regard to the terms and the extent of the agreement; and particularly, whether it was meant to be absolutely binding, or was, as the instruments purport, and the bill states, that it should rest upon honour. The counsel differed as to the extent of the agreement. *Mr. Graham's* idea I rather think most proper as to the extent.† In that case I should say, it was not a fair agreement and not consistent with the honour of the parties, and then I doubt, whether, consistent with the respect I always wish to pay to the Statute of Frauds, there is that degree of evidence that the law requires. From the consideration of respect to the parties and the argument I am saying too much in throwing out these difficulties, that would occur upon a bill properly framed. I am very sure, I ought to take no advantage from the defendant by demurrer or any other defence against that bill. One advantage he certainly would have; that Mr. Walpole could not claim without renouncing the legacy of 10,000*l.*

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Upon this view of the case the decree is perfectly of course.

† *Mr. Graham* admitted in the argument, that making mortgages, provisions for younger children, or other charges, would have been in fraud of the contract. The other counsel for the plaintiffs did not carry it farther in extent than a covenant to leave and not to revoke without notice.

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Dismiss so much of the bill as prays, that the will of 1756 may be established; and declare, that the will of 1752 is the will to which the codicil of 1776 applies. Direct an account of the personal estate, &c.

1797. *June* 30.

TALLEYRAND *v.* BOULANGER.*

(3 Vesey, 447—450.)

LOUGHBOROUGH, L.C.

It is contrary to principle that a Court of Justice should give greater effect to a foreign contract than it would have by the *lex loci contractus*.

[447] *MR. ROMILLY* shewed cause against a motion in dissolving the injunction against proceeding at law upon the coming in of the answer.

Upon the bill and answer the circumstances were these.

[448] In 1788 the brother of the two plaintiffs was appointed Bishop of Autun in France; and having upon that occasion borrowed money from the defendant, the Bishop as principal, and the plaintiff the Compte de Perigord as surety, bound themselves in an obligation to pay 70,000 livres by instalments. This obligation was payable to an agent or trustee for the defendant, or to the person who should be in possession of it; and was registered by a notary public according to the law of France. By the law of France the person could not be arrested either upon mesne process or in execution under that obligation. After some payments under this obligation the second revolution took place in France; which ended in the imprisonment and death of the King and the establishment of a Republic. The plaintiffs and the defendant then quitted France and came to England; and their property was confiscated. The Bishop of Autun remained there. The Compte de Perigord, being about to sail on the expedition, which took place to the coast of Brittany, was arrested by the defendant; and upon that occasion in order to procure his release he paid the defendant 100*l.* in cash; and gave him two bills of exchange for 100*l.* each, payable in two

* Questioned *Liverpool Marine Credit Co.* v. *Hunter* (1868) L. R. 3 Ch. 479, 486, 37 L. J. Ch. 386.

and four months; and he executed a bond, payable at the end of six months after a peace should be concluded between France and England, for the remainder of the debt, calculated at upwards of 1,400*l.*, with interest payable in the mean time, as therein stated. Upon this occasion the other plaintiff first became a surety by joining in these securities. After the first bill of exchange was paid, the plaintiffs under the advice they received, refusing to make any more payments, were arrested and held to bail by the defendant in four actions; upon which the bill was filed for an injunction.

Mr. Romilly, in support of the injunction:

These securities ought to be set aside. There was no consideration for them; and they were obtained under such circumstances, that a Court of Equity will not sustain them. The defendant could not sue upon this obligation, as he has done at law. It is different from *Folliott* v. *Ogden*, 1 H. Black. 123; 3 Term Rep. B. R. 727; where both parties resided in the British dominions, and had the English laws in view in their contract. This is a foreign contract, executed in a foreign country and according to the laws of that country. This Court will not take notice of the penal laws of a foreign country; but will as to contracts, when called upon to execute the contract. This debt is peculiar: it is the debt, not of the principal, *but a mere surety; with regard to whom there could be no implied contract; who could be bound no farther than the terms of the contract he entered into; and under that his person would not be liable. Another objection is, that this obligation was payable only to the agent, or the possessor of it: the defendant does not appear in it. In his answer he says, he revoked the authority of the trustee: but he does not state that notice was given. I am informed, that the Court of Common Pleas discharged a defendant upon common bail under similar circumstances; as the person would not have been liable by the law of France.

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Attorney-General and *Mr. Fonblanque*, for the defendant:

The plaintiff having entered into a contract of debt, and

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migrating into this country, the laws of this country must regulate the contract between them; upon which an *assumpsit* would arise. They might have applied to the Court in which the arrest was made: but judging for themselves they chose to settle it upon other terms; therefore there is no equity to set that aside. At least the money ought to be brought into Court.

LORD CHANCELLOR:

I think, the proceeding on the part of the defendant has been extremely oppressive and immoral. I am not prepared to say, how far this Court will finally give redress: but I will not allow the defendant to avail himself of an advantage got by duress; which is the sole cause of the new engagement. If it stood upon the original contract, it would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another to give a greater effect to the contract, than it would have by the laws of the country where it took place. The principal question here is one, that the unfortunate conduct of a great many of these persons has occasioned; who being all afflicted with the same calamity have not humanity enough to have that consideration for each other, all being involved in that common calamity, that has excited great consideration in this country. It is against all conscience and humanity, that the persons who could not by the original contract, should by their common calamity be enabled to hold each other in durance. It has appeared to me, that it is not out of the power of Courts of Justice in this country to apply according to the principles of
[*450] humanity the justice of the country in these cases. * I am glad to hear, and I have no doubt about it, that a Court of Law would upon such grounds discharge the defendant upon common bail. I have a little doubt, how, consistent with the forms of the municipal law of the country, I can stop the action as to the effect of it against the person. Perhaps a Court of Law might find itself enabled to put some check upon the execution: but surely, if it is unconscientious to take the person purely for the purpose of holding that person in custody, it would be very hard, if the equity of this Court could not some way or other

reach that person. The defendant first against all conscience and humanity gets the advantage of holding this person in confinement contrary to the nature of the contract; and in that confinement he gets a new contract executed. First, as to the money: he had a right to get what money he could: but I cannot suffer these bills of exchange so obtained to have effect. I cannot suffer these actions to proceed; and if I put them upon terms, it would contradict the ground upon which I proceed. It appears to me, that I shall in all probability set aside these bills.

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Let the injunction be continued.

MABERLY *v.* STRODE.†

(3 Vesey, 450—456.)

1797.
July 3, 5.

ARDEN, M.R. for the LORD CHANCELLOR.

Limitation over upon the death of a person unmarried and without issue: "unmarried," in its usual sense, meaning never having been married, "and" was construed "or" to afford a reasonable construction.

In the Statute 3 W. & M. c. 11, the apparent meaning of the word "unmarried" is, not married at the particular time, contrary to its usual import.

SAMUEL STRODE by his will, dated the 3rd of July, 1771, devised all his real estates, except an estate at Henham in the county of Essex, which he afterwards gave to his son Samuel Strode in fee, and all his personal estate, except what was before specifically bequeathed to his executors and their trustees, their heirs, executors and administrators, in trust to sell the real estate, as soon as might be after his decease; and he directed, that as well the money arising by the sale as all his personal estate, which he desired should with all convenient speed be turned into money, and the whole from time to time be invested in Government or real securities, in trust to pay the dividends and interest to his said son Samuel Strode for life: and after his decease to transfer the principal unto and amongst all and every the child and * children of his said son in equal proportions; or [*451]

† *In re Sanders' Trusts* (1866) L. R. 1 Eq. 675.

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if but one, to such only child; if a son or sons, at twenty-one; if a daughter or daughters, at twenty-one or marriage; the interest in the mean time to be applied for their maintenance and education or advancement in the world: "but in case my said son shall die unmarried and without issue or having issue they shall all die before he she or they if a son or sons shall attain the age of twenty-one years respectively or if a daughter or daughters shall attain the age of twenty-one years or be married respectively then and in such case in trust to assign and transfer the principal of such funds and securities unto my nephews William and James Strode and to my niece Cecil Strode in equal proportions share and share alike his her and their issue or the issue of either of them to take their parent's share with benefit of survivorship to my said nephews and niece Provided always and my will and meaning is that in case my said son shall marry he shall have power and I will that my said trustees shall join therein to settle the value of 2,000*l.* out of the said principal funds and securities for every 1,000*l.* he shall *bonâ fide* receive as and for the portion and portions of any wife or wives respectively in bar of all dower." * * *

The testator died in February, 1775, leaving his son Samuel his only child; who in January, 1776, married Grace Caulfield. Cecil Strode died in 1780, having never been married. James Strode died on the 1st of April, 1787; leaving his widow Isabella and five children. Samuel Strode the younger never had any issue: and he died on the 25th of July, 1795, leaving his wife Grace surviving; and by his will * * he gave all the rest and residue of his real estate whatsoever and wheresoever and of what nature soever to his wife, her heirs and assigns; and appointed her executrix.

The bill was filed by the surviving trustee and executor of Samuel Strode the elder to have this will established and the rights * of the parties ascertained. [The only question here reported was, Whether the limitation over was good, the testator's son not having died a bachelor.]

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Mr. Graham and *Mr. Winthrop*, for Grace Strode. * * *

Solicitor-General and *Mr. Campbell*, for William Strode; *Mr. Mansfield* and *Mr. Steele*, for Isabella, widow and administratrix of James Strode; *Mr. Grant* and *Mr. Richards*, for his younger children; and *Mr. Anstruther* and *Mr. Alexander*, for his eldest son. * * *

MASTER OF THE ROLLS:

In the Statute upon Settlements, 3 William & Mary, c. 11, s. 7, it is apparent, that the Legislature meant by the word "unmarried" not having a wife at the time: the words are "If any unmarried person not having child or children shall be lawfully hired:" but that is not the usual construction of that word in a will. * * *

MASTER OF THE ROLLS:

July 5.

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The proviso giving the son in case of his marriage, a power to settle the value of 2,000*l.* in bar of dower for every 1,000*l.* he shall receive as a portion, is material in the construction of the first part of this clause. It is contended, that according to the strict grammatical construction "and" being a conjunction copulative, the meaning must have been, that unless he died unmarried and without issue, it was not to go over; and it was insisted, that the word "unmarried" strictly means not married at the time the gift is to arise; or if referred to any particular time, it means unmarried at that time; and that this testator did not mean without having ever been married. I do not know, that the word was ever used in that sense except in the instance I mentioned, in the statute with regard to settlements; where the Legislature certainly thought fit to use it in that sense: but there they used it with such additions as put the meaning out of all doubt; for if it was not used in that sense, the man could have had no child or children. But notwithstanding it is so used there by the Legislature, the question here is, what is the common and usual meaning of it in a will, or the common acceptation of it in language. If legacies or annuities are given to unmarried daughters, which is a very common way, could they go to widowed daughters? Certainly it never has been so considered; and, I believe, is not the usual sense in which

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testators or persons in common language use it. It must mean such as have never had a husband at all. If that is the common acceptation, there is nothing in this will to induce the Court to put an unusual construction upon it. Then how far ought the word "and" to be construed copulative, making the two circumstances necessary to concur. That word is often construed "or;" and if the word "unmarried" should mean, what I suppose it must have meant in this will, "or" must be meant by the testator. It is frequently so construed to give a fair and reasonable construction to the will; and I feel no difficulty in construing it so in this case; because the testator meant by "unmarried" never having been married, and it is necessary to give a fair and reasonable construction. Therefore I am of opinion, the bequest over has taken place. * * *

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(3 Vesey, 478—486.)

1797.
July 14, 18, 21, 31.

Rolls Court.
ARDEN, M.R.

[478]

A registered conveyance of premises in Middlesex for valuable consideration established against a prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient.

EDWARD JOLLAND, tenant in tail of certain houses in Half-moon Street, and Seven-star Court, Old Street, in the county of Middlesex, under the will of Robert Long, dated the 2nd of July, 1731, by indentures of lease, dated the 20th of October, 1785, in consideration of a house having been built on part of the premises by Daniel Hands under articles, dated the 5th of May, 1784, and in consideration of a fine of 20*l.* and the rents and covenants entered into and reserved, demised the same ground and newly erected house to Daniel Hands, his executors, administrators and assigns, for sixty-one years under a rent of 10*l.* a-year, payable to Edward Jolland, his heirs and assigns. This lease was registered according to the Statute 20 Anne, c. 7, upon the 27th of October, 1785. By deed poll indorsed upon the lease and dated the 24th of February, 1787, Hands in consideration of 300*l.* assigned to William Loveday; who upon the 18th of January, 1790, in consideration of 300*l.* assigned to John

Palmer. Upon the 27th of January, 1790, the premises were put up to auction; and William Stainbridge was declared the best bidder at 270*l.* 18*s.* and paid a deposit of 50*l.* On the 3rd of February, 1790, the assignments from Hands to Loveday and from Loveday to Palmer were registered. By indenture, dated the 9th of February, 1790, reciting the sale, Palmer assigned to Stainbridge; under which assignment he was in possession. That deed was registered on the 27th of February.

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After the death of Edward Jolland, Sophia Jolland an infant, his only child, brought an ejectment, claiming under the will of Robert Long as issue in tail: but that will not having been registered, the plaintiff was nonsuited. She then filed the bill; charging notice to Hands previous to the lease, and also to Stainbridge previous to his becoming entitled.

The defendant by his answer stated, that he purchased the said lease, which together with the said several assignments is in his custody, and which have been all duly registered, at a public sale by auction on or about the 27th of January, 1790, for 270*l.* 18*s.* without any notice from any other person of the existence of any claim in any person whatsoever; and he submitted, that, as he purchased the premises at a public auction for valuable consideration without any notice of the existence of the plaintiff's title or of the said devise or will, when he paid his purchase money, the same is void. He does not know or believe, and was never informed, that previous to the granting the lease Hands, or the person, to whom it was granted, had any notice; and believes, he had no notice or intimation or reason to believe or suspect, or that he did in fact believe or suspect, that Robert Long had made such will, or that Edward Jolland was entitled under the will as tenant in tail only, or any notice or intimation to that effect: on the contrary the defendant believes, that he had no such notice or suspicion; since if he had any such notice or intimation, he would not have taken a building lease: but the defendant positively denies, that this defendant previous to his paying his said consideration money upon the purchase of the said lease had any notice whatsoever or the most distant intimation to that or the like effect; and he submits, that as Edward Jolland pretended to be seised in fee, and was in possession at

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the time of executing the lease, and as the lessee and the mesne assignees paid valuable consideration as well as this defendant, and all the deeds were registered, and this defendant had no notice, intimation or suspicion, of the plaintiff's alleged title or claim previous to the execution of the assignment and payment of the consideration money, or of the existence of any such title as the complainant set up, and having duly paid the reserved rent, and expended considerable sums in improvements, and as the will of Robert Long was not registered, the relief prayed will not be granted.

[480] The evidence of notice was to the following effect:

Brayfield, book-keeper to the defendant Stainbridge, deposed, that the wife of the defendant about the beginning of 1790 told the deponent in the presence of the defendant, that Mrs. Jolland (mother of the plaintiff and now Mrs. Colton) had that day been with the defendant, and desired him not to have any thing to do with the estate; for that it belonged to her daughter; and the person, who was about to dispose of it, had no right to sell; and the defendant and his wife asked the deponent, whether he thought the defendant would be safe in purchasing the estate at an auction: the deponent said, he thought, the defendant would be safe, if he purchased it at an auction.

Elizabeth Hands, widow of Daniel Hands, stated the lease to her husband; and that he built a dwelling house; and he and his wife lived in the house; and the deponent from time to time paid the rent on behalf of her husband to Edward Jolland for about a year or upwards; after which she paid it to the agent of Joseph Allen, to whom Jolland had mortgaged it, till the sale to Stainbridge. Hands previous to the lease to him and to the building the house informed the deponent, that he and Branscombe, a broker, had been to Doctors' Commons, and had there read the will of the person under whom Edward Jolland claimed the estate; and he and Branscombe were well satisfied with the title. About nine years ago Hands was sentenced to be transported to Botany Bay; where he died. A short time before that sentence Loveday, now deceased, out of friendship to and to secure the estate for the benefit of the deponent procured an assignment from Hands; which was afterwards executed by

Hands in Newgate, and executed for the benefit of the deponent; and Loveday never paid any consideration. The deponent delivered the lease to an attorney for the purpose of having the assignment prepared; and the assignment and the lease were afterwards delivered to the deponent, and continued in her possession for some time. She afterwards borrowed of Palmer 17*l.* 17*s.* and delivered the assignment and lease as a security; and about four or five months afterwards, the said 17*l.* 17*s.* then remaining due to Palmer, he prevailed upon the deponent to have the estate sold by auction; and it was sold accordingly at the said house, where the deponent lived, and was purchased by Stainbridge for 270*l.* 18*s.* Hands had expended 300*l.* upon the premises; and some time before the sale Moorsman told the deponent, he would have given 500*l.*; but four or five months afterwards at a *meeting between the deponent, Palmer, Stainbridge, and Morris, an attorney, the deponent received 70*l.* part of the purchase, and all, she ever got. A day or two previous to the auction Stainbridge came to the deponent's house, and told her, Mrs. Colton (formerly Mrs. Jolland) had been with him and informed him, that the title to the said lease of the said estate was not a good one; and therefore she thought, it would not be right for him to purchase such estate; and that he told her, that if he had a mind to purchase the said estate and run the risk, it was nothing to any one. Previous to the auction the deponent went by Stainbridge's desire with him to the house of Morris; when Palmer produced the lease and assignment; and Morris reading them told Stainbridge, that if he purchased the estate, he (Morris) would indemnify him. [*481]

Elizabeth M'Neale deposed, that a few days previous to the sale Anne Jolland called to Stainbridge, as he was passing by the door; and told him, she heard, he was going to purchase the said estate; and therefore thought proper to inform him, that the title thereto was not good; upon which he appeared displeased; and said, Poh, Poh; and went away.

This evidence was confirmed by Samuel Pitt.

Shipman, an auctioneer, deposed, that he was applied to by Palmer in 1789 to sell the estate; but from something, that appeared to him upon reading the deeds, and also from the

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report, that a good title could not be made, he declined being concerned.

Young deposed, that immediately after the sale he was present at a public house, and read the lease to the parties present; and some doubts arising as to the title, Palmer promised to indemnify Stainbridge.

Anne Colton, mother of the plaintiff, deposed, that Edward Jolland was in 1785 generally reputed owner as heir in tail under the will of Robert Long. She has heard him say several

[*482] times, he was so entitled. In 1785 Edward Jolland *shewed Hands a copy of the said will; and he was fully apprised and acquainted with the nature and extent of the title; and in the same year Hands told Jolland, that he had been with Mr. Hussey or Hough to Doctors' Commons, and had seen the said will and was well satisfied with the title.

This deponent then gave the same account as M'Neale and Pitt of her conversation with Stainbridge, when he was passing by the house; and said, that the day after the sale she went to his house; and in the presence of Oliphant told him, that a good title could not be made to the said estate; and added, that as her husband was dead, such estate had come to her child; and therefore she requested, that he would not have anything to do with the same: he said, he would do as he thought proper.

Oliphant deposed, that to the best of his recollection and belief no conversation passed between him and Stainbridge or between Stainbridge and any other person in his presence concerning the estate in question.

Mr. Piggott, for the plaintiff:

Hands, and all who claim under him, were bound to look to the title of the lessor; and can have no better title, than he could give them. The validity and duration of the lease must depend upon his power to grant it; and they who took it, were bound to inform themselves of the extent of his power. Every purchaser is bound to look to the title of his vendor; and cannot plead ignorance of that, which, had he looked, he would have known. The fact of the vendor's possession cannot justify the vendee in treating with him as tenant in fee-simple without requiring title-

deeds, abstracts, or any other evidence of his title. Either the purchasers have not looked to the title of the vendor, and have not fulfilled the obligation to inform themselves, but have purchased in the dark and at their peril, or they cannot be ignorant of the plaintiff's title. They do not allege any attempt to inform themselves, and that the information, they sought, was withheld; nor do they offer any excuse. No papers to evidence the title were required. Had the purchaser inquired about the title, the vendor must either have forged a title, or have shewn the will, which would necessarily have discovered the plaintiff's title. If a grantee or devisee in tail by avoiding to register the deed or will creating the entail, and finding a purchaser, who will take a conveyance in fee from him, and register it without looking farther or asking a single *question about his right to [*483] make such conveyance, can devest the unborn issue of their title *per formam doni*, the consequences of such a transaction and so new a mode of conducting a purchase are very extraordinary and important. A tenant for life in possession, with remainders to *feme coverts*, infants, or persons not *in esse*, may upon the same principles and by the same means effect the same purpose. Can that be the true construction of the statute? According to this doctrine the tenant in tail or tenant for life in possession has an interest in omitting to register; and by such omission the former can effect all, he could effect by fine and recovery, and the latter, what he cannot effect by any other means. I agree, if two persons derive under the same person, the last deed without notice of the first and registered shall prevail against the first in date not registered. Here the issue in tail claim, not under the vendor, but by a title paramount under the same instrument, which gives him title. If the defendant meant to protect himself under Loveday and Palmer, he ought to have alleged, that he did so, and that they had no notice. He had not done that; and the plaintiff has made ground enough for an inquiry, whether they are not men of straw, trustees for Hands; and that the defendant was dealing with them knowing that, and that the sale was for the benefit of Hands and his family. The assignment from Hands to Loveday purports upon the face of it to be three years before the registration, and to be an absolute assignment of

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Hand's interest. The assignment to Palmer was upon the 18th of January, 1790; and upon the 27th Stainbridge purchased. Both assignments were registered together, subsequent to the purchase, and for the purpose of bolstering up the title, Stainbridge had then acquired. He cannot put himself into a different situation by any act done subsequent to his purchase with notice; viz. by getting in the prior assignments, and registering those; which he could not do with his own deed. This is not like *Hine* v. *Dodd*, 2 Atk. 275, one witness fully contradicted by the answer; upon which ground alone the bill was dismissed. *Le Neve* v. *Le Neve*, 1 Ves. 64; 3 Atk. 646; Amb. 436, was upon the evidence of a single witness, Norton the agent. If this evidence will not do, no evidence will; and there is an end of the equity. It is under the head of fraud that equity relieves. *Sheldon* v. *Cox*, Amb. 624, is upon the same principle. Parol evidence was admitted in all the cases.

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Mr. Lloyd and *Mr. Short* for the defendant:

It is unfortunate, that the Court has departed from the statute by admitting evidence of notice *aliunde*. It has in fact repealed the statute. But the Court will not now extend that, or hold such loose and desultory evidence as this sufficient. If Hands was a purchaser without notice, Stainbridge may shelter himself under that; though he had notice: *Harrison* v. *Forth*, Pre. Ch. 51, 1 Eq. Ca. Ab. 331; *Lowther* v. *Carleton*, For. 187, 2 Atk. 242. No notice is proved against Hands except by one witness, contradicted by the answer. In the great case of *Le Neve* v. *Le Neve* there was no doubt as to the notice: but the question was, whether Norton was agent or not; and Lord HARDWICKE considers all those cases as depending not so much on notice as fraud; as where the agent buys the estate himself, and registers his own deed, having his employer's deed in his pocket upon a trust to register it. In all the cases there is something of recital in the instrument, something beyond parol evidence, something more than what Lord HARDWICKE calls suspicion of notice.

MASTER OF THE ROLLS:

July 31. In this cause the value of the property is not such as to make

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an issue desirable; and if I am to decide it, I am of opinion, the bill must be dismissed; for it does not appear to me, that the plaintiff has made out a case to entitle her to the relief prayed. There are a great many suspicious circumstances in this case. One thing is clear: the parties, who sold to Stainbridge, if they sold on their own account, have sold in violation of the trust reposed in them. Nothing is more clear than that. Loveday and Palmer, the two persons supposed to purchase under Hands, were mere trustees for his family; therefore with regard to them, I think the objection of *Mr. Piggott* to their being interposed as any bar to the relief is well founded. Their registry was with a view to this transaction; therefore I desire to be understood to lay the conveyances to them totally out of the case. Then, laying out of the case the two intermediate conveyances, the question is, how far there was notice, such as this Court holds sufficient against a purchaser for valuable consideration, either to Hands or to Stainbridge himself. It is very clear, that Hands, who was convicted of receiving stolen goods, and was transported, assigned this over in consequence of his situation. The witness Mrs. Hands comes in a very extraordinary way to set aside a conveyance, as she says, made in trust for her. The *first [*485] question is, whether there is evidence sufficient, that Hands was perfectly aware, the lessor had only a limited interest. The principal witness is Hands's wife. It is very extraordinary, that she should come; who paid rent for these premises under her husband; and admits, that he having laid out this money assigned, first, to Loveday, but as trustee for her; and then they were assigned to Palmer as a security for a very trifling sum of money, only 17*l.* 17*s.* and she states broadly, that her husband's conveyance to them was only in trust for her, and she states broadly knowledge in her husband of the defect of title; and the way, she makes it out, is, that she says, Hands went to Doctors' Commons, and there saw the will, and was perfectly satisfied with the title. It is almost inconceivable; for if Jolland was tenant in tail, it was the easiest thing, that could be, for him to make a good title. It is almost incredible, that Hands should take a lease for sixty-one years, and lay out money, and see, that Jolland had a very good title, if he chose to make it so. Two

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other witnesses say, Hands had looked at the will, under which Jolland claimed these premises: but none of them go to the will of Long, which was made in 1731, and which created this entail; and I must suppose, that if Hands did go to Doctors' Commons and saw any will, it was another will. It is impossible not to see that Mrs. Hands gives this evidence from spite. Whatever the rule may be as to the registration of deeds, it is impossible to let such evidence as this be brought to prove notice upon a purchaser for valuable consideration. I must admit now, that the registry is not conclusive evidence: but it is equally clear, that it must be satisfactorily proved, that the person, who registers the subsequent deed, must have known exactly the situation of the persons having the prior deed; and knowing that, registered in order to defraud them of that title, he knew at the time was in them. I am to suppose upon this loose evidence, that Hands went to Doctors' Commons, saw, that it was an entailed estate, upon which the man could make him a good title, and that he chose to commit this fraud upon the issue in tail without getting a recovery suffered and a good title thereby made to him. Therefore there is no sufficient evidence of any knowledge in Hands of any defect of his lessor's title.

If notice was proved against Hands, I will not say, there is not sufficient ground for an issue, at least as to the notice upon
[*486] Stainbridge. *I do not like his manner of swearing himself a purchaser for valuable consideration without notice. It is clear, whether he had notice of the plaintiff's title, or not, he had some intimation of the claim of the plaintiff. He ought to have declared that in his answer. His sheltering himself under those general words makes me imagine, he thought it sufficient not to have notice at the time of the auction. I agree, it is not sufficient to prove notice to assert, that some other person claims a title; yet all the evidence given here is of that sort. The plaintiff's mother was guilty of great neglect in merely telling the defendant, he would purchase at his peril. She never attended the auction; and never registered this will; of which she says Stainbridge had notice. That would have been a much better way. Then the person purchasing would have had notice, not only of the claim, but what sort of claim it was. I very much

doubt, whether that general claim is sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge. If the premises would bear it, I should be inclined to grant an issue: but as it stands, I am of opinion the bill must be dismissed; but without costs. The plaintiff is an infant; and may not be bound by the decree. Stainbridge has not made a very honest defence. The grounds, upon which I dismiss the bill, are, first, that there is not sufficient proof of notice to Hands, nor, secondly, to Stainbridge. If the parties wished to have it tried, I would not discourage an application: but I am afraid, it is a hopeless case.

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I regret, that the statute has been broken in upon by parol evidence; and am very glad to find, Lord HARDWICKE in *Hine* v. *Dodd*† says, nothing short of actual fraud will do.

LONG *v.* BLACKALL.‡

(3 Vesey, 486—491.)

1796. *July* 19.
1797. *Aug.* 1.

LOUGHBOROUGH, L.C.

[486]

Leasehold property bequeathed in remainder in trust for a child *en ventre*, if a son, for life; and after his decease for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator: a son being born and dying without issue, the limitation over was established in favour of the next of kin according to the Statute at the time of distribution, as if the testator had then died.

GEORGE BLACKALL being possessed among other things of a messuage, lands and tenements, in great Haseley, held by lease from the Dean and Chapter of Windsor, for a term of years, by his will, dated the 23rd of April, 1709, gave to John Toovey and *Richard Blackall, their executors, administrators and assigns, [*487] the said leasehold premises, in trust, that they should permit his wife and her assigns to possess the mansion-house during her widowhood, and to receive the rents and profits of the residue of the premises, until she should marry or die, or until one of her sons should attain the age of twenty-one; and from and after the death or marriage of his wife as for and concerning the said mansion-house, and as for and concerning the residue of the

† 2 Atk. 275.

‡ *Re Sturge and G. W. R. Co.* (1881) 19 Ch. D. 444, 51 L. J. Ch. 185.

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said premises from and after the death or marriage of the said wife, or the time, that one of his sons should attain twenty-one, which should first happen, in trust for his son Thomas during his life; and after his decease then in trust for such issue male or the descendants of such issue male of the said Thomas as at the time of his death should be his heir at law; and in case at the time of the death of the said Thomas there should be no issue male nor any descendants of such issue male then living, that the trustees should be possessed of the said premises in trust for the testator's son George Sawbridge during his life; and after his decease then in trust for such issue male or the descendants of such issue male of his said son as at the time of his death should be his heir at law; and in case at the time of the death of the said George Sawbridge there should be no such issue male or any descendants of such issue male then living, then in trust for the child, with which his said wife was then *ensient*, in case it should be a son, during his life; and after his decease then in trust for such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law; and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then the said John Toovey and Richard Blackall, their executors, &c. should be possessed of the said premises in trust for such persons as should then be the legal representatives of him the said George Blackall; and he appointed his wife sole executrix.

The will, as originally prepared, gave the property to the child, of which the wife should be *ensient*, and his issue generally after the decease of the testator's other two children and failure of their issue. It appeared to have been afterwards altered by interlining the word "male" wherever "issue" occurred; and the ultimate limitation originally was, that in default of issue of
[*488] the unborn *son the trustees should be possessed of the premises in trust for "the executors and administrators of my said son Thomas;" those words were struck through with a pen; and the following words were interlined, "such persons as shall then be my legal representatives."

The testator died in June, 1709; leaving his two sons Thomas

and George Sawbridge surviving, and his widow *ensient* of a son, afterwards born; viz. John Blackall. The widow proved the will. She married Richard Carter; and having survived him died in 1778; by her will appointing her son Thomas Blackall her executor. He was also executor of his brothers George Sawbridge and John; of whom the former died in 1753, the latter in 1754; both without issue. John Toovey and Richard Blackall assigned the premises and delivered up the lease to Thomas Blackall; who died without issue in March, 1786; having by his will, dated the 9th of March, 1784, devised his freehold and copyhold estates to certain uses, and appointed Lord Viscount Parker, James Musgrave and John Blackall, his executors; and having given the said leasehold estate to the two former in trust for such person or persons, and for such estate and interest, and under and subject to such charges, provisoes, powers, restrictions and limitations, as were mentioned concerning the freehold and copyhold estates devised to them; or as near as the nature of the leasehold estate would permit; with a direction to renew the lease from time to time out of the rents and profits thereof.

The lease, which was originally granted in 1708 to the testator George Blackall for twenty-one years, was several times renewed: first, in the names of the trustees John Toovey and Richard Blackall; afterwards in the name of Thomas Blackall.

John Blackall, Philippa Long, Hester Blackall, Ann Blackall, and Elizabeth Blackall, were the next of kin according to the Statute of Distributions † of the testator George Blackall at the death of his son Thomas; being the five surviving children of John Blackall, paternal uncle of the testator George Blackall. John Blackall died; leaving his son John Blackall his executor. Ann and Elizabeth Blackall also died; and Hester Blackall was surviving executrix of Ann and administratrix of Elizabeth.

The bill was filed by Philippa Long and Hester Blackall; [489] praying, that the new lease may be declared subject to the same uses and trusts as the former lease; and that the defendants John Blackall, Lord Viscount Parker and James Musgrave, may be compelled to deliver possession and the said lease, and account

† 22 & 23 Car. II. c. 10.

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for the rents and profits since the death of Thomas Blackall. Two questions arose: 1st, Whether the testator George Blackall intended his personal representatives according to the Statute of Distributions, or under the authority of the Ecclesiastical Court: 2ndly, Whether the limitation over was too remote. As to the latter question, when the cause came on for farther directions on the 19th of July, 1796, the LORD CHANCELLOR directed a case to be made for the opinion of the Court of King's Bench, stating the disposition as of the legal bequest of a term of years, and inserting the name of the plaintiff Philippa Long instead of "in trust for such persons as shall then be my legal representatives:" the question was, whether the limitation to Philippa Long was good in the events, that have happened? The judges by their certificate answered in the affirmative.

The cause came on upon the equity reserved.

Solicitor-General, *Mr. Grant*, *Mr. Romilly* and *Mr. Bell*, for the plaintiffs:

The words "legal representatives" cannot mean the artificial representation granted by the Ecclesiastical Court; for if that was the testator's meaning, the natural way would have been to have given it to his wife as such. He could not mean any casual person, that she might make her executrix, or who might take out administration to her. He could not mean such persons as at his death should be his next of kin; for his wife and sons were obviously those persons: and it is given after the death of all of them. It means clearly representatives at some future time; and that can only be the time of distribution. An anxious intention to keep the property in his family as long as he could is apparent. The probate furnishes decisive evidence; for if he meant his executors, he would merely have inserted the word "my," and have struck out the words "of my said son Thomas." In *Bridge* v. *Abbot*, 3 Bro. C. C. 224, there was more ground to contend, that the intention was to throw the property into the estate of the legatee, and merely to prevent a lapse, not intending
[*490] any *particular representative: but the decision was in favour of the next of kin. In *Evans* v. *Charles*, 1 Anstr. 128, which seems an extraordinary case, the particular intention was merely to

make up the deficiency to the creditors; and there was no intention in favour of any particular representative: but being once given to the creditor it was intended to go according to chance. In the construction of the Statute of Distributions, and 1 Jac. II. c. 17, representatives mean those by the law of nature, not those under the authority of the Ecclesiastical Court.

Attorney-General, *Mr. Mansfield*, and *Mr. Graham*, for the defendant John Blackall:

The executors of Thomas are in the ordinary sense the legal personal representatives. In the statute cited the word "representatives" does not mean next of kin, unless where it means descendants also. Here all the descendants are gone, before the question arises. *Evans* v. *Charles* shews, that these words must mean the individual, who had the legal right to the property; though not intended by the person, he represents, to take any part of it. They are bound to make out clearly, who are intended. The safest way is to take the words in their legal sense. It would be more clear to say, his heir at law is entitled, than such person as should be his collateral next of kin.

Reply:

The Statute of Distributions did consider, that there was a species of representation by affinity besides that granted by the Ecclesiastical Court; as in the direction, that there shall be no collateral representation beyond nephews and nieces.

LORD CHANCELLOR:

I think both the determinations, that have been cited, perfectly right. They shew, the words are to be explained according to the subject matter. Have they any meaning, if I take them in the legal sense? I can better tell what was not, than what was, his meaning. It is perfectly clear, referring to a future time he could not mean his legal representatives. He altered a very sensible part of his will; which is vastly strong; for it proves, he thought upon it, and had some decided meaning. His first thoughts were very sensible to give the absolute interest to his son, in case the entail could not take effect. That would have

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been the wisest thing, he could have done. In making that alteration, which he did with deliberation, not suffering his son to take this remainder after all the particular purposes were exhausted, *it is quite impossible, he should mean it to vest in his wife, transmissible to those, who should become her legal representatives. It would be too much conjecture to apply the words to an heir at law; particularly upon leasehold property. There is nobody, I think, who can take it but the next of kin at the time of distribution. He certainly meant to keep it in his blood. He could not mean, that it should be as if he had not disposed of it, clearly.

Decreed in fifths: one fifth to the plaintiff Philippa Long; three fifths to the plaintiff Hester Blackall; and one fifth to the defendant John Blackall.

WALLIS *v.* THE DUKE OF PORTLAND.*

(3 Vesey, 494—503.)

1797. *Feb.* 8, 10. *Aug.* 7.

LOUGHBOROUGH, L.C.

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Bill for discovery, whether the plaintiffs were not employed by one defendant, a Peer, as solicitors to present and prosecute a petition on behalf of the other defendant, complaining of a return of a member of Parliament, and praying that he might be duly elected: demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law.

The office of a pleader is not to make a case, but to state it fairly according to his instructions.

Maintenance justifiable from the privity of the parties in estate, or their connection, as master and servant.

THE bill stated, that the plaintiffs were in 1789 employed by the defendant, the Duke of Portland, to act as his solicitors, and to present on behalf of the other defendant George Tierney a petition to the House of Commons, complaining of the return of George Jackson, Esq. to serve as member for the borough of Colchester in Parliament; alleging, that Tierney had been duly elected; and praying, that he might be declared duly elected. The plaintiffs in compliance with the direction of the Duke of

* *Bradlaugh* v. *Newdegate* (1883) 11 Q. B. D. 7.

Portland caused a petition to the effect aforesaid to be prepared and presented; and continued to act as solicitors on the said petition during the whole period, which the same was depending; and advanced very considerable sums on account, amounting in the whole to 3,407*l.* 11*s.* 6*d.* The petition being determined on or about the 4th of April, 1789, the plaintiffs delivered their bill of costs to a gentleman, who then acted as the confidential friend *of the Duke; and not having received the amount they repeatedly [*495] applied to the Duke and to Tierney for the same.

The bill then stated several pretences of the defendant the Duke of Portland, that he was not indebted to the plaintiffs; and never instructed them to act as his solicitors, and to present such petition; or to expect, that the expense, which might be incurred in presenting and proceeding upon it, should be defrayed by him; and that he repeatedly, after the petition was presented, declared to the plaintiffs, that he did not consider himself liable; and in particular, that a gentleman, then his confidential friend, by letter communicated to the plaintiffs, that the Duke did not consider himself liable to any demand in respect of such petition, and apprised the plaintiffs, that if they proceeded thereon, they must not look to him for payment of the charges, which might be thereby incurred; and that the plaintiffs being so apprised did proceed thereon upon the credit of Tierney. In answer to these pretences the plaintiffs made the following charges.

About the beginning of February, 1789, they were informed by Tierney that he had just seen the Duke of Portland, and that he was directed by the Duke to instruct the plaintiff Troward to present the said petition, and to prosecute the same; and that the plaintiffs believing the said direction to have been received by Tierney from the Duke did present and proceed on such petition on the credit of the Duke in consequence of such direction. The only intimation, they ever received, of the Duke's not considering himself liable was by a letter, dated the 15th of March, 1789, from a friend of the Duke of Portland to the plaintiff Troward (set forth in the bill) which after suggesting, that it was material to have a consultation on the state of Colchester with the Duke, Mr. Tierney, the plaintiff Troward and some other persons, and

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stating some circumstances, which then prevented it, concluded thus :— " Your very handsome offer to me in your letter, of the 3rd instant, is most properly considered: but I am desired to say, that it is impossible to think of putting you to the inconvenience, which accepting it would be attended with to you. As things now stand, it is material, that we should turn our attention to the expense incurred, to that, which is likely to be incurred, and to the probable judgment of the committee in the end. It *seems to me, that the sum, which I mentioned to you and Mr. Tierney to be brought in aid of the expense of the petition, must be exhausted; and that it would be unfair to him not to suggest this to his consideration. You and he are better able to judge of every circumstance than anybody else; and as my object in obtaining a consultation on the case has been frustrated, I hope you will be prepared to have it considered as soon as possible; in order that no measure may be pursued, which can tend to produce any difficulty about the expense, or to lead to more than Mr. Tierney may think convenient for him to bear."

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The plaintiff Troward being much surprised and alarmed at the conclusion of the said letter shewed it to the defendant Tierney; who expressly declared, that he did not consider himself liable to the costs of the petition; and that he was as aforesaid authorised and directed by the Duke to instruct the plaintiffs to present and proceed upon it. The plaintiff Troward answered the said letter; stating, that he had shewn it to Tierney; and that it had a good deal alarmed him; as he said, he never intended making any addition to the expense already incurred by him: and that it was understood, that he was not to be at any expense respecting the petition, and reminded the plaintiff, that he had so informed him in the beginning of the business; and the plaintiff farther stated, that he conceived the expense incurred at that time to be not less than 1,300*l*. The plaintiffs not receiving any reply proceeded upon the petition; concluding, that if the Duke had intended to withdraw his liability to the costs, he would in consequence of the plaintiff's letter have declared such intention. The expense then incurred did not exceed 1,500*l*. and the plaintiffs were entitled to be repaid that sum by the Duke, though he had thought proper to withdraw himself from future liability. The plaintiffs never

received any sum on account of their demand except 1,000*l.* which they received from Tierney; and which they have heard and believe he received from the Duke. The plaintiffs repeatedly applied to the Duke for payment; and he has not complied with their request of payment; though he has in conversation admitted the justice of the same; and on or about the 27th of June, 1789, the Duke in a letter to Tierney says, he has just heard, that some doubts remain in the plaintiff's mind respecting Colchester, and desires Tierney to refer him to the letter, *which Mr. A. wrote him with the privity and concurrence of the [*497] Duke, or to appoint a meeting; that no misunderstanding may remain respecting that business. The Duke considered himself liable to the whole or part of the expense; and has admitted the same within the last six years; but has requested the plaintiffs not to prosecute their demand, but to wait some time longer.

The bill then stating, that without a discovery the plaintiffs cannot make their demand available at law, prayed a discovery with reference to the facts charged; and whether in the communications between them and the Duke the latter did not subsequent to the 15th of March, 1789, refuse to permit the plaintiff Troward to give his time and attendance without charge; as he could not think of accepting such offer; and whether he did not consider such offer as amounting to an offer to proceed without any person being responsible; and whether by declining it he did not consider, that he entitled the plaintiffs to charge some persons, and whom, for the personal attendance and diligence of the solicitor.

Both defendants demurred generally.

Attorney-General, *Mr. Mansfield*, and *Mr. Pemberton*, for the defendant, the Duke of Portland:

A person standing in the situation of this defendant would not act the part, the public has a right to expect, if from his feelings, and because he could deny the truth of every syllable of this bill, he should do anything to destroy that protection by demurrer,

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which upon grounds of public policy is held out to the whole country. 1st. Nothing is stated calling upon the Duke for an answer: 2dly. The transactions are of such a sort, that this Court will not endure them to be stated. This Court would never endure even in the ordinary case of real or personal property a bill stating upon the face of it a case of gross maintenance; a maintenance of such a nature, that a court of justice cannot interpose to give any protection to the efforts of any persons stating themselves to be concerned in it. It is against a standing order of the House of Commons. Can a discovery be enforced to help them to the expense of enabling a peer to introduce a man into the House of Commons, who would not undertake it for himself? There are two or three Acts of Parliament, the last the 28th Geo. III. c. 52, s. 1, requiring, that every petition shall be
[*498] signed by the person presenting it. *There is no writing by the Duke; therefore according to the Statute of Frauds he cannot be charged. The plaintiffs have not stated, that they have brought or mean to bring an action, or want testimony for it, because, if it could be tried, it is clear, Tierney is a competent witness to prove the whole of it; which must be the ground of his demurrer. In *Walsh* v. *The Executors of Lord Clive* the bill was brought by the candidate himself for the expenses of the Worcester election upon Lord Clive's undertaking to pay: Lord THURLOW treated the cause with indignation.

Solicitor-General, *Mr. Piggott*, and *Mr. Fonblanque*, for the plaintiffs:

This is not within any of the Acts imposing punishment on maintenance. It is determined, that suits in the Ecclesiastical Court are not within any of those Acts. They are confined to suits in the Courts of Common Law, except the Act 32 Hen. VIII. c. 9, which extends to the Star Chamber, the Court of Requests and this Court: *Tisdale* v. *Bedington*, Cro. Eliz. 594. Hawkins certainly supposes, that the law does not include in the crime of maintenance any suit except in the Courts of Common Law and the extension by the statute of Hen. VIII.; which is

confined to suits respecting lands. . This respects, not the election, but the petition; and therefore is not within the resolutions of the House of Commons. These petitions are of recent origin, founded upon an Act of Parliament referable to such subjects and very peculiar.

LORD CHANCELLOR:

Without inquiring into the quality of the act, I wish you to state, what could be the consideration in law, that would support the promise. You must state, that the defendant in consideration, that the plaintiffs would present and carry on a petition for Tierney, promised to pay the expense. Put this case: a subscription to carry on a petition to the House: I confess, I always thought, there was something of crime in it: but be that as it may, if the subscription was in writing, would an action lie for the money subscribed? Upon the Statute of Frauds a collateral promise to answer for the debt of another distinctly supposes, that there is a debt. The debt must be first raised, before you talk of a collateral promise.

For the Plaintiffs:

Immateriality is no objection to the discovery: *Bishop of London* v. *Fytche*, 1 Bro. C. C. 96; *Hindman* v. *Taylor*, 2 Bro. C. C. 7. As to the objection from the Statute *of Frauds, that [*499] would be an objection at law, but not in this stage. It might be for a debt to be contracted; for instance, goods to be delivered. Both interfering in the original transaction, it is too doubtful to bring it within the statute. The whole proceeding moves from an alleged contract with the Duke. It was the opinion of Lord THURLOW, that the only effect of the Statute of Frauds against a bill for discovery of an agreement was, that if the agreement was denied, it prevented the party from resorting to evidence.† Tierney cannot be examined as a witness except upon a release.

† The LORD CHANCELLOR observed, that he did not quite assent to that. It is not clear that Lord THURLOW's final opinion was, as it is here stated.

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Reply:

The statutes with regard to maintenance have nothing to do with this: The question is, whether this transaction has not so much of what arises from maintenance in its nature as to make it unfit for this Court to entertain the bill upon grounds of public policy. No one person interested in the election is stated to complain of it. It was a rash conclusion, that if the Duke meant to withdraw his liability, a reply would have been sent to the plaintiff's letter. That the 1,000*l.* paid on account was received by Tierney from the Duke is not made the subject of a direct averment. If this was a case, upon which an action could be maintained, Tierney is a good witness; because the plaintiffs state upon the record, that they never gave credit to him; and then the allegation, that they cannot make their demand available at law, is not enough. I deny, that this Court does sit to give a discovery, that is immaterial. In *The Bishop of London* v. *Fytche* Lord THURLOW proceeded upon the idea, that the bond was perfectly legal: if not, it is anomalous. In *Oliver* v. *Haywood* and *The Mayor of London* v. *Ainsley*, 1 Anstr. 82, 158, and *Selby* v. *Crew*, 2 Anstr. 504, immateriality was held a ground of demurrer; and it is so considered in Mitf. Pl. 154. A demurrer lies, where the discovery may subject the defendant to pains or penalties, or, as the *Solicitor-General* very well puts it, Mitf. Pl. 157, to punishment of any kind. In *Harrison* v. *Selwin* the ground of the demurrer was, that the discovery would forfeit the defendant's seat in Parliament. Lord HARDWICKE had no difficulty

[*500] in taking *notice of the powers of that House, which exists by the law of the land. Though a matter cannot be brought within the express ground of an Act of Parliament, analogy is a sufficient objection here. Marriage-brocage bonds, &c. are not void upon Acts of Parliament; nor were they till very lately considered as bad at law: *Collins* v. *Blantern*, 2 Wils. 341, and another case before Lord Mansfield are the first cases, in which such bonds were held bad at law. In *Harrington* v. *Du Chattel*, 1 Bro. C. C. 124, Lord THURLOW decided upon grounds of public policy against a bond for the purchase of an office; though not within the statute 5 & 6 Ed. VI. So agreements to put an end to prosecutions for felony or even fraud are treated the same way

upon the same ground. In *Johnson* v. *Ogilby*, 3 P. Wms. 279, the Reporter attempts a distinction between fraud and felony: but the bill was dismissed.

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LORD CHANCELLOR:

It is not from any doubt I entertain, but in order that I may give my opinion more correctly, that I wish to defer it. The point happens not to be entirely new to me; for some years ago there was a case in the Court of Common Pleas, that led me to the topics of argument in this case. It was an action brought by Mr. Shaw for the expenses of the petition against Sir Thomas Beavor for Norwich. The defence was, and the fact was true, that certain persons, probably electors, had put the defendant upon petitioning, upon an undertaking, that they would pay all the expenses, and he had nothing to do but to give his attendance; that they retained Shaw and counsel. The agent was not the defendant's agent, and was never employed by him upon an election or any other business. All was communicated to Shaw from time to time and at the beginning. Serjeant *Adair* was counsel for the defendant. Upon my direction to the jury, not doubting the evidence, they found a verdict for the plaintiff. My direction was founded upon this; that the party petitioning and attending the petition could not by setting up the engagement of any other person deliver himself from the expenses of his own suit. In that case this circumstance occurred; that so many as were electors might have a sort of interest in their representative. That led me to consider, in case an action had been brought against them, how far it would be maintained. No application was made to the Court to set aside the verdict. At that time from the value and the novelty of the case I looked a * good deal into it; in what cases it fell directly within the legal description of maintenance; in what it was against the policy of the law to permit such suits against persons, not the immediate parties. When this cause was first opened to me, I had the grounds of that opinion before me. [*501]

All the law books state the offence of maintenance to be, not upon the statutes, but it is repeatedly said to be *malum in se*; and those acts, that are acts of maintenance in a suit not subject

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to particular provisions of the statutes, are punishable by indictment at the King's suit. I do not mean to go farther into the case now.

LORD CHANCELLOR:

Aug. 7.

It is not from any doubt, that I postponed giving my opinion; but from having mislaid the note, I made very recently after the argument. The bill is only for a discovery without any prayer of relief. It is a proposition of no doubt, that a court of equity has no authority to compel a party to answer interrogatories. The *subpœna*, that issues in this Court, must be grounded upon some equity stated upon the bill; upon which the Court can aid the suit of the plaintiff by relieving him from some defect of the mode of trial at common law, of which the other party ought not in conscience to avail himself, but which the forms of law would allow. A bill of discovery brought for no specific purpose would at best be impertinent; probably very mischievous. To such a bill a demurrer is the proper answer. The demurrer grounds itself upon one of two grounds; either that no case is made, that calls for any answer; or that upon such case, as is set forth, the defendant is not bound to discover any circumstances stated; because they may tend to involve him in penal consequences of the supposed transactions. The present bill, I am extremely glad to observe, is very fairly drawn; for it states without reserve the instructions laid before the pleader. I take notice of it; because it is extremely proper, and part of the office of the pleader, fully and fairly without any gloss to state such instructions, as are given him. It is no part of the duty or business of the pleader to make a case; but only to state it. In the old books it is stated to be commendable in the pleader to say, "*Non sum veraciter informatus; ideo nihil dicit.*" There are many passages in Hawkins, where it is very ably discussed, how far it falls within maintenance to state a case with more advantage

[*502] than * belongs to it. That is certainly not the case of the present bill. It is quite obvious, that if all the facts stated in the bill were set forth in an action, the plaintiff would be inevitably nonsuited. Though that may be in itself a good cause of demurrer, there is a stronger ground; for if the discovery could

be material for any purpose, and aid the plaintiff in bringing forth that case in an action, which is stated in his bill, it is such a case as a court of conscience would not permit to be made, or give any aid in bringing it forward. The case disclosed is of this nature; an undertaking supposed between the plaintiff and the defendant, that the latter would contribute to the expense of a petition against the return of a member of Parliament in the whole or a given extent. That is an engagement between two parties to the injury and oppression of a third: in short, it is maintenance; for maintenance is not confined to supporting suits at common law. In the first book you open upon the subject (one naturally looks into Hawkins) it is stated to be either *in pais* or by prosecuting suits. Maintenance *in pais* is punishable by indictment. Maintenance by prosecuting suits, without distinguishing what suits, is punishable by an action by the party grieved also; and that is an action at common law. Statutes prohibiting particular species of maintenance add penalties: but it is laid down as a fundamental authority, that maintenance is not *malum prohibitum*, but *malum in se:* that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense. There is no case in contradiction to this. The case cited from Cro. Eliz. proves nothing. It was supposed to prove, that maintenance was not applicable to Courts Christian. It is nothing like that. After declaration it was moved in Court, that the action would not lie. What does the Court do? They put the party to plead or demur. What the Court would have done upon that is not stated. The ground of the objection was, that the action was misconceived, being upon the statute 1 Rich. II. which gives no action. That statute only contains particular penalties. An action would lie at common law. I can have no doubt upon that. An action for a malicious suit in the Ecclesiastical Court is commonly and frequently maintained. In the several cases to be found in Anstruther (there are three of them) the Court has always gone upon the idea, that it is impossible to sustain a bill for discovery, the effect of which would be to bring out a case of maintenance. The manner, in which it is considered * at law, is strongly illustrated in *Pierson* v. *Hughes*, [*503]

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1 Freem. 71, 81, which was an action of debt upon bond for money expended and to be expended in the prosecution of that suit. Upon the first argument it was held maintenance; that giving the bond was as great an evil as laying out money. *Maynard* as *amicus curiæ* stated, that to speak to a counsel or an attorney to encourage the suit, wherein he had no interest, had been adjudged maintenance. Upon the second day the argument took this turn; that as only a bond was given, no maintenance was in fact committed, upon the common maxim "*non officit conatus nisi sequatur effectus.*" The answer of *Vaughan* was, that a bond given to maintain or kill will be void, though the act never ensue. ATKYNS, Justice, was of opinion, that a bond given, while the suit was depending, for what was already expended was maintenance; because an encouragement to go on with the suit. The result of the cause is immaterial to the argument; because the Court was of opinion, and very properly, that the defendant was mistaken in demurring, and ought to have pleaded; for there is a justifiable maintenance, arising from the privity of the parties in estate, or from their connection, as master and servant. Therefore there was a possible case, in which that bond might have been available at law; and that ought to have been negatived by plea.

I do not go into the argument, which was very properly urged in support of the demurrer, upon considerations of public policy: because I am of opinion upon the whole of the case, that it is directly stating a transaction of maintenance; praying a discovery of that, which, if the discovery was made, would fall within that specific reprobated offence stated by the common law; that if the discovery was made, it would be *malum in se;* therefore I am of opinion, it is not fit for a court of equity to permit this suit to proceed any farther.

*Allow the demurrers with costs.**

* Upon appeal to the House of Lords the order, allowing the demurrers, was affirmed with 200*l.* costs, without hearing the counsel for the respondents, 5th April, 1798.

HINCHCLIFFE *v.* HINCHCLIFFE.

(3 Vesey, 516—530.)

1793.
June 17, 20.

1797.
Aug. 12.

Rolls Court.
ARDEN, M.R.

[516].

Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances: accounts in the testator's handwriting were admitted as evidence of the circumstances under which he made his will; but not to explain the will.

DOCTOR HINCHCLIFFE, afterwards Bishop of Peterborough, at the time of his marriage with Elizabeth Crewe, was possessed of a leasehold house in Conduit Street, held under an annual rent of 6*l.* 17*s.* 6*d.* for a term of twenty-eight years commencing at Lady-day, 1766, under a lease, dated the 29th of September, 1756, renewable every fourteen years on payment of a fine of 48*l.* 2*s.* 6*d.* He was also entitled to an annuity or rent-charge of 300*l.* payable for his life by John Crewe, brother of Elizabeth Crewe. Elizabeth Crewe was entitled to 6,000*l.* secured by two bonds of Samuel Egerton. By indentures, dated the 8th of May, 1767, in pursuance of an agreement previous to the marriage John Crewe, in consideration of the surrender of the grant of the said annuity, granted to Elizabeth Crewe, the intended wife, an annuity of 300*l.* from the solemnisation of the marriage for ninety-nine years, in case she should so long live; and by another indenture of the same date the said leasehold house, the annuity, and the sum of 6,000*l.* together with the said bonds, were assigned to trustees; in trust after the marriage during the joint lives of Doctor Hinchcliffe and his wife to raise and pay the yearly sum of 80*l.* to such persons and for such uses, as the said Elizabeth without the control of her said intended husband should from time to *time appoint; and subject to the said annuity to [*517] permit Doctor Hinchcliffe to receive the rents and profits of the leasehold premises, he paying the fine of renewal, and also the interest of 6,000*l.* for his natural life, and also the annuity of 300*l.* during the joint lives of him and his intended wife; and after his decease, in case she should survive him, and there should not be three or more children then living, upon trust to pay to or permit her to receive the rents and profits of the

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leasehold premises and the annuity during her life: but in case there should be three or more children then living, then after the death of Doctor Hinchcliffe to assign the leasehold premises and the 6,000*l.* together with the securities, in which the same should be invested, to and among all such children equally, share and share alike, payable to a son or sons at twenty-one, and to a daughter or daughters at twenty-one, or marriage with consent of their father, if living, or if dead, of the trustees and their mother: provided, that notwithstanding the postponement of the assignment of such shares till after the decease of the father every share should be considered as vested in a son at twenty-one, in a daughter at twenty-one, or marriage with such consent; with a provision for survivorship, and for maintenance by application of the rents, interest and produce, after the death of the father and mother, and for raising upon the requisition of the husband and wife or the survivor such sums, payable at such times as they should under hand and seal with two witnesses appoint for the advancement of any of the children; such sum or sums, as they should require, to be deemed and taken as part of their shares of the trust funds; and if the father or mother should advance any of them out of their own money, then they or their respective executors should receive out of such child or children's respective shares so much, and the same should be deemed as part of such child or children's share of the trust premises; in case he or she should by writing under his or her hand so declare; and not otherwise; and it was provided, that upon the requisition of the husband and wife or the survivor the leasehold premises should be sold, and the 6,000*l.* be invested in other securities upon the same trusts.

The marriage took place; and there was issue, two sons and three daughters. The Bishop of Peterborough received the 6,000*l.* due on the two bonds; and invested 5,425*l.* 17*s.* 8*d.*, part thereof, in a mortgage of an estate, called Breton Ferry: he also sold the *leasehold house in March, 1786, for 1,050*l.* the trustees not being consulted. He purchased 2,050*l.* 15*s.* Irish debentures; whereby certain annuities were made payable to him, his executors and administrators, depending upon the lives of his two sons and his daughter Frances respectively; and another

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Irish security for a similar annuity for the life of his daughter Emma Duncombe; the whole of which Irish annuities are of the annual value of 134*l.* He also purchased two French annuities of 100*l.* each; depending, the one upon the lives of his wife and his daughters Emma and Frances, the other upon the lives of his wife and his daughter Charlotte.

By his will, dated the 29th of December, 1793, he gave to John Crewe and Benjamin Barnard all his estates, goods, chattels and property, of what nature or kind soever, in trust first to pay his debts and charges of his funeral; and upon farther trust declared in manner following: then to pay his wife the sum of 500*l.* and farther to pay her annually, so long as she shall live, the sum of 200*l.* being the produce of an annuity upon her life purchased of the Duke of Devonshire, in addition to an annuity of 300*l.* settled upon her at her marriage, and payable by John Crewe, her brother, or by his heirs; and also to pay his said wife during her life the produce of two annuities in the French funds of 100*l.* each: in trust also to pay his wife the produce of all the Irish tontine annuities during her natural life to her own use; and after her death in trust to pay to his daughters respectively during their natural lives the sum arising from the tontine annuities during their respective lives; and in case they or either of them should marry, the tontine annuity of such daughter, who marries, is to be held for her separate use and appointment, not liable to the debts of any husband: "I will my sons to have each his tontine annuity upon the death of their mother; in trust also to pay the interest of 3,000*l.* owing to me upon mortgage by the Duke of Grafton; which interest is not to be paid but for the rent of my house in George Street; which house I will that my wife have the use of for her life or widowhood, together with the use of all my furniture, plate, linen, pictures and liquors, an inventory being taken of the several articles and lodged with my executor, so long as she remains unmarried: should she marry again, I will, that the 3,000*l.* specified to pay the rent be divided equally among my three daughters, who *may be then living, in addition to what else [*519] shall be bequeathed to them: but if one, two, or all of them, be dead, and have left issue, then what would have been the

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mother's share I would have paid to the representative or representatives of each." The testator then declared, that the lease of his house in George Street, household furniture, pictures, linen, and plate, as specified in a schedule, together with what liquors may remain, should become the property of his eldest son, or in case of his death before the death or marriage of his mother, the property of his (the testator's) son Edward: "In trust also, that each of my sisters be paid by my executor an annuity of 30*l.* which they purchased of me; and I will, that to each of them be paid 100*l.* and a mourning ring given in token of my sincere affection, and an addition of 10*l.* a year during their respective lives be made to each over and above the 30*l.*; and upon the death of either I will, that to the survivor during her life be paid the whole annuity of 60*l.* instead of 30*l.* I will also, that my executor with consent of my trustees or the survivor of them may have power to call in for the purposes of my will all monies in the funds, lent upon mortgage, bonds, or otherwise, and to sell the leases of all my houses, except that in George Street, so long as my widow continues to live unmarried again I will also, that the tontine Irish annuities shall not be sold during my wife's life, nor the annuity upon my wife's life payable by the Duke of Devonshire In trust to pay the sum of 6,000*l.* to my son Edward. I will also that each of my daughters, as they shall respectively attain the age of twenty-one, or be married sooner with consent of their mother and my trustees or the survivor of them, be paid the sum of 4,000*l.* and until my daughters shall attain the age of twenty-one, or be married with the consent before required, my will is, that to each be made an allowance, as the trustees and executor may think fit, for her maintenance and education. It is my will also, that after the death of my wife the interest arising from the French annuities of that standing in the names of Emma and Frances Hinchcliffe shall be paid to them of the other standing in the name of my daughter Charlotte be paid to her. I will, that the annuities themselves be unalienable, and to remain in trust, as is directed in regard to the Irish tontines." After giving some legacies the testator left his eldest son Henry John Hinchcliffe, whom he also
[*520] appointed sole executor, *the residue, whatever it might be,

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of his whole fortune, except his sermons and books of divinity, which he directed to be delivered up to his son Edward.

The testator died in 1794. The bill was filed by the younger children; praying, that they may be declared entitled to the benefits provided for the younger children by the settlement as well as to all the benefits provided and bequeathed to the plaintiffs respectively by the will. The eldest son by his answer insisted, that from the year 1778 to 1781 and from 1784 to 1793, and, as the defendant believes, in the interval, his father kept regular accounts of the amount and particulars of his property and of his debts and the progressive increase or decrease of his property by reference to such debts and otherwise from one half year to another; and in such accounts he has regularly set down the money due upon the mortgage, as part thereof; the interest of which mortgage he regularly received without the intervention of the trustees, and gave receipts in his own name; and the leasehold premises were also comprised in such accounts, as part of such property, until sold by the Bishop in 1786; and from that time the produce was brought into the accounts; and was intermixed with and constituted part of the said property; as appears by the said accounts in the hand-writing of the Bishop. The defendant insisted, that the testator having kept such accounts, and blended the trust property with his own, and calculated upon the whole together without any distinction, made such disposition of the same by his will, as therein contained; and it appears manifestly as well from the state and amount of his property as from the accounts so kept and provision made thereout for the plaintiffs by his will and the legacy bequeathed thereby to the defendant's mother, that the testator did not intend to give the plaintiffs double portions; but intended the portions given to them respectively by the will to be in lieu and full satisfaction for their respective interests under the settlement; therefore they ought to elect.

The accounts referred to by the answer were books in the testator's handwriting; stating his property and his debts, and comprehending the leasehold premises in Conduit Street, the mortgage upon the Breton Ferry estate and the annuity. At first he valued the house in Conduit Street singly at 1,600*l*. After-

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wards down to January, 1786, he values his three houses at 3,000*l.* *By that account he values them at 2,500*l.* The accounts of July, 1786, and January, 1787, state two houses, value 1,500*l.* Afterwards he values them with the lease of the house in George Street at 1,600*l.*, and in 1793 at 1,800*l.* The result of the first account in 1778 was, that he was worth 13,572*l.* Every subsequent account stated, how much he was better or worse than the preceding settlement; and the result of the last was, that he was worth 39,138*l.* In January, 1786, he states 10,800*l.* 4 per cent. stock, worth, at 87, 9,301*l.* and the account of July following (after the house was sold) states 12,000*l.* 4 per cent. stock, at 91, 10,900*l.* The account of July, 1786, contained the following items: "Received of Mr. Lunot in part of payment of the house 50*l.*"—"Received of Mr. Lunot by his note 31*l.* 10*s.*"

The first question was, whether these books of accounts were admissible.

Mr. Graham and *Mr. Sutton*, for the defendant:

In *Pulteney* v. *Lord Darlington*, Reg. Lib. A. 1773, fol. 710, evidence very similar to this was received, and was one foundation of the decree: a paper-writing purporting to be an account of Mr. Guy's affairs. It appears both by the decree and the notes of the arguments of the Judges, that the extrinsic circumstances, the deeds and other writings, were relied on. In *Jeacock* v. *Falkener*, 1 Bro. C. C. 296, Lord THURLOW says, evidence as to the facts, upon which the testator made his will, may be admitted. That is the purpose, for which these books are produced; and not to explain the will. The will being silent as to this point, those facts are necessarily to be taken into consideration, as marking the view of the testator, when he made his will. In *Ellison* v. *Cookson*, 3 Bro. C. C. 61, Lord THURLOW admitted the evidence; and says, it is to be admitted in all cases of a presumption of satisfaction. In the case of Mr. Selby's will it was held competent to give evidence as to the situation of his family. The state of the testator's funds when he makes his will is a subject of daily inquiry. The danger of perjury by admitting parol evidence does not arise in this instance. *Debeze* v. *Mann*, 1 R. R. 57.

Mr. Grant and *Mr. Steele*, for the plaintiffs:

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In *Pulteney* v. *Lord Darlington* the evidence was competent to shew, what the testator's acts had been. This was not a question of construction. In **Ellison* v. *Cookson* there was no question about the meaning of the will. The point upon the evidence was only, whether the legacy was adeemed. *Bromley* v. *Jeffereys*, Pre. Ch. 138, is against the admission of evidence. In *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472, the point was much discussed. It is clearly not a settled point. In this case the question is upon the construction of the will, and the object of the evidence is to shew, that the will does not mean what *primâ facie* it purports.

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MASTER OF THE ROLLS:

June 20.

I have looked into the point; and have great doubt about admitting the evidence: though I am very much inclined to admit it. This is not evidence produced to explain the will in any way: if so, it would be clearly inadmissible. *Heather* v. *Rider*, 1 Atk. 425, is the strongest case for receiving written evidence of the intent that can be: but I cannot understand that case; and I suspect, there is some mistake in it. I did not know before, that the books of General Pulteney had been admitted in evidence. I will hear the evidence: but I desire not to be understood as admitting it. When I give judgment, I will decide, whether it is to be admitted or not.

For the Plaintiffs:

The testator will be supposed to intend to give his own estate, and not to affect what he had no power over. The gift of an annuity to his wife in addition to the annuity provided by the settlement shews, he recollected the settlement: he must then have recollected, that his children were entitled to certain provisions under it; therefore if he intended a satisfaction, he would have expressed it. He cannot be supposed to have forgotten the provisions of the settlement. * * * [They cited *Warren* v. *Warren*, 1 Br. C. C. 305.]

For the Defendant:

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* * * The purport of the evidence is to shew, he con-

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sidered the trust property as part of his own estate; and that he received and applied it to his own use. The lease of the house in Conduit Street was renewed and assigned by him without the intervention of the trustees. By receiving the value of the house in Conduit Street and the difference between the 6,000*l.* and the mortgage, he became a debtor to his children; therefore it is the same as if he had been under covenant, in which case it would have been a satisfaction. There is no distinction between a covenant and a debt by his own act: *Weyland* v. *Weyland*, 2 Atk. 632. * * *

[They also cited *Copley* v. *Copley*, 1 P. Wms. 148, and some other cases referred to in the judgment.]

[524] Reply. * * *

1797. *Aug.* 12.

MASTER OF THE ROLLS:

[525] This cause has stood a considerable time; and the greatest doubt, I had, was, how far certain memorandums, a state of the testator's property, as drawn out by himself, could or could not be admitted in evidence in any degree to affect the question now under consideration. Upon consideration of all the cases, and the principles, upon which they are determined, respecting the intention of the testator in giving a portion by his will to a child already provided for by settlement, I am of opinion, that without intrenching upon any of the rules respecting evidence, of which I am as jealous as any Judge that ever sat in a court of equity, this state of his property is evidence, and is very material: at the same time I do not mean to have it understood, that I decide entirely upon that; for, independent of that, the facts themselves together with the rules, as applied to settlements and wills providing portions for children, are sufficient to shew the intention, that the provision by the will should be a satisfaction of the portions provided by the settlement. The books will be evidence, if only to prove the fact of the disposition of the house. It appears by them, that the house was sold between the 1st of January, and the 1st of July, 1786: the particular time does not appear; for so much did he suppose, the house was at his own disposal, that he does not take any notice of the sale. It clearly appears, and you may trace it in the books, that the produce was laid out by him in the funds.

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Of the 6,000*l.* it is plain, he received near 600*l.*: the rest was laid out in a mortgage. It does not appear, that he gave any receipt or acknowledgment. He bought the lease of another house. It does not appear, that he ever consulted the trustees with regard to the sale of the house, or considered himself as violating the settlement; which certainly in strictness he was doing. But I use that only as an argument, that he conceived of this settlement differently from what it really was; for it is impossible *to read this state of his property, and to consider him [*526] as aware of the extent of his interest, and wilfully breaking through the settlement; for there never was a more careful or regular man. It appears, he kept an exact account of the state of his affairs. He states every year what his property was, calculates the amount, and the next year says, whether he was better or worse than at the former settlement. This is evidence, not for the purpose of explaining the will itself, for which it is clear, it cannot be admitted, but to shew the circumstances, under which he made his will. It is clear, the money arising from the sale of the house was not received by the trustees. From the accounts I cannot exactly trace, how the purchase-money was paid. There are only two receipts entered: one for 50*l.*, the other a note for 31*l.* 10*s.* I suppose, the rest was paid in money. In 1786 the testator began to be more accurate and more attentive to the value of his property. For some time before that he began to make half-yearly accounts. I cannot trace the increase of the 4 per cent. stock in the interval between the accounts of 1786 otherwise than by the produce of the sale of the house; and it appears, he received part of the purchase-money, by the other entries. It appears, his property had considerably increased. He made his will not a great while before his death; and I am sorry, it was so near; for it appears, that in all probability he had not as complete a recollection of his affairs, as if he had been in better health. The bill claims both the provisions under the settlement and the will; to which it is answered, that according to the principles of construction of the will of a parent, where portions are provided by a settlement, it ought to be taken in satisfaction; and under all the circumstances of this case I am of that opinion. It was extremely well

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argued; and every case, that could bear upon it, was very fully observed upon: but it was said, that of late that doctrine, that appeared established respecting double portions, had received some discountenance from Lord THURLOW; and that he had in *Warren* v. *Warren* ‡ and some other cases hinted a disapprobation of it. From the whole of those cases relied on to prove that I see clearly, that he never did mean to say, such a rule does not obtain in this Court; that a portion provided by the father is to be *primâ facie* intended as a satisfaction. It is very true, that speaking chiefly of the ademption of a legacy by the advancement of the parent afterwards he laments, that the Court has carried it so far as to go in some cases against the intention: but so far from saying, that rule is not established, he says, it is too late to say, it is not the rule now; though it is frequently

[*527] carried even against *the intention. I never found, that he meant to break through the rule. No man criticised more upon rules laid down by other Judges: but no man was more rigid in observing them, when he could once deduce them. The cases, I chiefly rely upon, are *Copley* v. *Copley* † and the succeeding cases, particularly *Warren* v. *Warren*; which never was determined by Lord THURLOW. I wish this to be considered as different from the cases of a will and a subsequent advancement. The cases before Lord Thurlow were chiefly of that kind. I take the rule to have been never yet departed from, that *primâ facie* a portion to a child by the will of the parent, if there is any other prior provision, is a satisfaction, unless it is shewn clearly that it is not so intended. *Copley* v. *Copley* is more shortly reported than most of the cases in Peere Williams: but Mr. Cox has stated it from the Register's Book. The time of payment of the sum under the second settlement does not appear in the Register's Book: but the circumstance of that sum not being payable, unless the daughter married, was insisted on in argument to shew, it was not a satisfaction for the portion at all events payable at the age of twenty-one. Without taking up the time of the Court in commenting upon the intermediate cases, all of them are cited and relied upon in *Warren* v. *Warren*. ‡ I do not know, whether the judgment pronounced by Lord

† 1 P. Wms. 148. ‡ 1 Br. C. C. 305.

Commissioner ASHHURST is to be considered as the opinion of all the Lords Commissioners; for Lord LOUGHBOROUGH did not attend that day. Lord THURLOW, when the cause came before him, is stated to have thrown out this: "A great number of cases have been cited to shew, that the Court leans against double portions: but I have not found, that it would do as a distinct rule, that where a parent has made a provision by will for a child, whom he has afterwards provided for in marriage, it is *primâ facie* a satisfaction." That is not the case before him. I suppose, if he said so, it must be upon some cases cited in argument. From that and what follows it has been assumed, that he was of opinion, there was no such rule. In subsequent determinations he has said, it is too late to question the rule: but it has been carried too far. The Lords Commissioners gave their opinion shortly; and they particularly mention the rule. The three cases in the note to that report are very material. *Ackworth* v. *Ackworth*, 19th July, 1773; *Byde* v. *Byde*,† before Lord Northington, 1 Geo. III.; and *The Duke of Somerset* v. *The Duchess of Somerset*, before Lord Camden, 9th, 10th and 11th March, 1767. **Ackworth* v. *Ackworth* very much resembles this [*528] case: but it is so long in the Register's Book, that it is not very easy to extract what the case was. A sum of 2,200*l.* was settled in trust for the husband for life; then for the wife for life; then for the children, with a power of appointment. The husband by will gave 2,000*l.* to each of his children; and directed, that his wife should take the interest for life in lieu of her settlement: the legacies were decreed to be a satisfaction. As to *Byde* v. *Byde*, the Register's Book has only the dismission of the bill; from which I collect, that the bill was brought by the children, having received one portion, for the other; and was therefore dismissed. I have not examined the Register's Book as to the *Duke of Somerset's* case: but if it is as reported, it is exceedingly strong. Portions were provided for younger children: the father by his will made a fresh provision for every branch of his family: an election was directed.

It remains to see, whether there were any peculiar circumstances in *Warren* v. *Warren*. It is said, the ground of that

† 2 Eden, 19.

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case was, that it was clear, the testator had forgotten the settlement; and that in this case he has not. That is a very considerable ingredient; that having forgot one provision he could not mean them to have both: but then you must resort to the rule of double portions; for that would not have done in the case of other persons; as if a debt was due, and he had forgot it;† for *non constat*, that he would not have done it, if he had not forgot it: I do not know, that it would do in the case of a wife: *non constat*, that, if he had recollected, there was something else, he would not have given it. Here it is clear, he recollected, there was some settlement upon his wife: but that he recollected what that was, is by no means clear. A circumstance occurs here much relied upon in *Jeacock* v. *Falkener*:‡ he gives her certain bounties: which he declares to be in addition. Why does he not say so as to the children? He knew, he had made a settlement, but forgot the nature of it. He recollected, he had made some provision for his children; but did not know all the ingredients. *Jeacock* v. *Falkener* is a strong case; I think, a hard case, I confess: but I am perfectly satisfied with it upon the reasoning. All the circumstances are extremely strong to fortify what I take to be the rule; that if portions are provided
[*529] by any *means whatsoever, and the parent gives a provision by will for a portion, it is a satisfaction *primâ facie*, and unless there are circumstances to shew, it is not so intended; and nothing is more clear, than that these are meant for portions. Maintenance is given by both. Though this is not the case of an eldest son having an estate, upon which portions are charged, yet the defendant is, as Lord LOUGHBOROUGH says, general representative in land or money, upon whom the burthen of the portions would fall. The doctrine upon this point is very shortly stated, and in a manner, to which I perfectly accede, in *Devese* v. *Pontet*, before Lord Kenyon, Finch's Pre. Ch. 240, n., that the rule should be adhered to, as laid down by a very great Judge, Lord SOMERS; who observed in *Goodfellow* v. *Burchett*, that cases of this nature depend upon circumstances; and when a legacy has been decreed a satisfaction, it must be grounded

† See Mr. Cox's note to *Chancey's* case, 1 P. Wms. 410.

‡ 1 Br. C. C. 296.

upon some express evidence or at least a strong presumption, that the testator intended it as such. Adopting this rule, as laid down unequivocally by Lord SOMERS, I am of opinion, that the portions by the will are intended in lieu and satisfaction of the portions by the settlement.

It is hardly worth while to state the difference between these cases and those upon the satisfaction of a debt by a will. Of all rules, that have been adopted in this Court, I should regret the rule, that a legacy is a satisfaction of a debt, provided it is equal to the debt. That however is clearly established: but any little circumstances are laid hold of by the Court to take it out of the rule. That is admitted at the bar not to be the case as to this doctrine of portions: for if both have the same object, and there are only slight differences, still they shall not both avail.

As to the books, I am clearly of opinion, nothing of this sort is admissible to prove, that the will has a meaning different from that, which it purports on the face of it: but it is to prove the circumstances, under which the testator made his will, with regard to the portions provided for his children, as to the state of his property and what he meant to give. The case of *Pulteney* v. *Lord Darlington* is very analogous. The question was, whether General Pulteney did or did not intend to comprise in the will an estate, of which he supposed himself the owner. To prove he did, the steward's accounts and a settlement, as drawn out by him, of the state of his property were offered in evidence, and *admitted, and commented upon. I have a note of the judgment [*530] upon the 28th of June, 1776. Chief Justice DE GREY says, "The intention appears from circumstances sufficient to make an impression upon my mind, and confirming the opinion, I had formed, not to throw entirely out of the case this settlement by a great family. A man may give by a mean and indirectly what is not his own; either by express condition, or equity arising upon an implied condition: the two modes are quite different; and were too much blended in the argument. Where the testator has neglected, probably from ignorance, possibly from inattention to the nature of the estate, to insert such a condition, then a court of equity interposes. The cases of double portions have no analogy to election: it is true, they involve election: but they do

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not depend upon election." Baron EYRE says, he does not agree to the position laid down in the general sense of it, that where a man gives all his estate, he does not mean to give what is not his: what he thinks his is in the sense, he uses the word, his.

It is impossible to doubt, that the Bishop did conceive, he had a right to dispose of all the property, he there describes as his own, in satisfaction of this settlement. It is impossible not to say, he thought, the settlement had not specifically bound this property. The bill therefore must be wholly dismissed.

I desire to be understood, that the books, I have admitted, are upon the question of election; upon which question I take them to be admissible: but not to explain the will.

1797. *Aug.* 16.

LOUGH-BOROUGH, L.C.

[554]

PARKER, EX PARTE.†

(3 Vesey, 554—555.)

The privilege of a bankrupt from arrest during his examination extends to an attachment for not paying money under an award made a rule of Court.

THE petitioner absconded to avoid paying money reported to be in his hands as assignee in a commission of bankruptcy, and which under an award, made a rule of Court, he was ordered to pay. Upon that act of bankruptcy a commission issued against him. He surrendered under the commission; and as he was going out of Guildhall from his examination, he was arrested under an attachment for the contempt. The petition prayed, that he might be discharged from custody.

Solicitor-General, *Mr. King*, and *Mr. Wetherell*, for the petition:

There is no difference between arrests under this attachment and under an execution. This is a mode of execution adopted in this Court for recovering a debt; not like an attachment for not putting in an answer: *The King* v. *Stokes*, Cowp. 136. *Bartram* v. *Dannett*, Finch, 253, shews the difference. It is determined,

† *Harvey* v. *Harvey* (1884) 26 Ch. D. 644.

that *absconding to avoid an attachment for not paying money awarded is an act of bankruptcy; which it could not be, if it was only a criminal process.

PARKER, Ex parte. [*555]

Attorney-General, contrà:

The words of the Act are "arrested for debt." In *Ex parte Gibbons*, 1 Atk. 238, it was held, that the bail of a bankrupt might lay hold of him during his examination, and surrender him in discharge of themselves.

LORD CHANCELLOR:

This is merely an attachment to enforce the payment of money. I think, the analogy of all the determinations goes to it.

The Bankrupt was discharged.

PEPPIN *v.* BICKFORD.†

(3 Vesey, 570—572.)

1797. *Dec.* 13.

LOUGHBOROUGH, L.C. [570]

Money bequeathed to be laid out in land to be settled upon the testator's nephew A. for life; remainder to the wife of A. for life, with remainders in tail to the sons and daughters of A. by such wife; A. was not married till after the death of the testator: held to extend to a second wife.

THE bill stated, that Arscot Bickford by his will, dated the 3rd of October, 1770, and duly attested to pass real estates, after directing his debts and funeral expenses to be paid out of the first money, that should be raised out of his estate, gave to his nephew Arscot Bickford Peppin 6,000*l.* which he directed should not be paid or payable until the day of the lawful solemnization of the marriage of him the said Arscot Bickford Peppin; on which day, or as soon after as it could possibly be done, he directed, that the said sum of 6,000*l.* should be paid and laid out by his executors thereinafter named in the purchase of some freehold messuages, lands, tenements, hereditaments and premises, in the counties of Somerset, Devon or Cornwall, which said freehold messuages, &c.

† *Radford* v. *Willis* (1871) L. R. 7 Ch. 7.

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it was his will that his said executor should immediately convey and settle unto and upon his said nephew Arscot Bickford Peppin and his assigns for and during the term of his natural life; and from and after his decease then to and upon the wife of him the said Arscot Bickford Peppin and her assigns for and during the term of her natural life; and from and after her decease then unto and upon the first son of the body of him the said Arscot Bickford Peppin on the body of such wife lawfully to be begotten in tail male; and for default of such issue to the use and behoof of the 2nd, 3rd, 4th, 5th, 6th, 7th, and all and every the other son and sons of the body of the said Arscot Bickford Peppin on the body of such wife lawfully to be begotten severally and successively in tail male; the elder of such sons and the heirs male of his body lawfully issuing being always to be preferred and taken before the younger of such sons and the heirs male of his and their body and bodies issuing; and for default of such issue then to and upon all and every the daughter and daughters
[*571] of him the said Arscot Bickford *Peppin lawfully to be begotten on the body of such wife and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing as tenants in common and not as joint-tenants; and for default of such issue then to the use and behoof of his brother-in-law George Bickford of Oakhampton in the county of Devon, his heirs and assigns for ever. The testator then directed, that his executors should pay to the said Arscot Bickford Peppin interest of the said 6,000*l.* at 3 per cent. from the day of his decease till the same should be so laid out, as aforesaid; which he directed should be done as soon as any such freehold estates could be bought; and he gave devised and bequeathed, all and every his manors, farms, lands, tenements and hereditaments whatsoever to the use of his brother-in-law George Bickford, his heirs and assigns for ever; and he gave all the residue of his personal estate after payment of his debts, funeral expenses and legacies, to his brother-in-law George Bickford, his executors, administrators and assigns, and he appointed his said brother-in-law sole executor.

The testator died about the 21st of April, 1771. George Bickford proved the will, and took possession of all the real and

personal estate of the testator. In October, 1772, Arscot Bickford Peppin married Dorothy Wells, his first wife; who at the date of his will was utterly unknown both to him and his uncle, the testator. In 1775 the sum of 2,800*l.*, part of the said 6,000*l.* was invested in the purchase of two estates, called Bury and Alford's in the county of Somerset; which were settled to the use of Arscot Bickford Peppin for life; and from and immediately after his decease to the use of the said Dorothy, his then wife, for life; remainder to their first and other sons in tail male, &c., as directed by the will; with a proviso, that nothing therein should prevent a settlement on any other wife of Arscot Bickford Peppin and his issue by such other wife, in case it should be deemed by Counsel to be the intent of the testator, that the lands to be purchased should be settled on any-taken wife of Arscot Bickford Peppin and his issue by such wife, in case the said Dorothy should die without issue in his life.

George Bickford died in May, 1795, leaving his son Arscot Bickford heir-at-law and administrator; who took possession of the real and personal estate of the testator, and upon the death of Arscot Bickford Peppin in June, 1796, took possession of the estates of Bury and Alford's. Arscot Bickford *Peppin, his first [*572] wife Dorothy having died without issue many years ago, in 1783 married the plaintiff.

The bill prayed, that it may be declared, that the estates directed to be purchased with the said 6,000*l.* by the will of Arscot Bickford the elder were to be settled on any after-taken wife of Arscot Bickford Peppin and his issue by such wife, in case his first wife should die without issue; and that an account may be taken, &c.

The defendant Arscot Bickford demurred to the whole bill, except so much as charges assets of George Bickford, and prays an admission thereof or any discovery, answer or satisfaction, for the estate and effects of George Bickford come to the hands of the defendant; and by his answer he denied, that there were assets.

Attorney-General, *Mr. Mansfield*, and *Mr. Hall*, for the demurrer.

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Solicitor-General and *Mr. Short*, for the plaintiff were stopped by the Court.

LORD CHANCELLOR:

If the wife had died within a month after the marriage, there could have been no issue to take the provision; and the legacy of 6,000*l.* except as to the life-interest of the nephew would in effect have elapsed. It is impossible to ascribe such an intention to the testator.

Overrule the demurrer.

1798.
March 1, 5.

Rolls Court.
ARDEN, M.R.

[628]

MORLEY *v.* BIRD.

(3 Vesey, 628—632.)

An interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction; as in partnerships, a joint mortgage, &c.

Specific legacy of stock decreed according to the value at the time it ought to have been transferred.

WILLIAM COLLINS by his will gave to his daughter Elizabeth all his freehold houses and land at Newbury and Bath and Weston with all his money in the stocks, mortgages, debts, &c. goods, chattels, "and everything I die possessed of I give this all to her only use and pleasure for ever on condition that she do pay to the four daughters of my brother John Collins four hundred pounds out of seven now lying in the 3 per cent. Consolidated."

Three of the four daughters of John Collins died in the life-time of the testator. The surviving daughter Martha in 1790

[*629] married *Thomas Morley. The testator died on the 1st of June, 1793. The bill was filed in June, 1797, by Morley and his wife against William Bird and Elizabeth his wife, the testator's daughter, claiming the whole legacy given to the four daughters of John Collins.

The defendants by their answer stated, that the defendant Elizabeth having been advised, that the plaintiff Martha was

only entitled to 100*l.* of the said 700*l.* 3 per cent. annuities the defendant Elizabeth from time to time caused to be transferred 600*l.* of such annuities; leaving 100*l.* to answer the plaintiff's legacy, and which the defendant offered to transfer and to permit the plaintiffs to receive the dividends accrued subsequent to the testator's death.

MASTER OF THE ROLLS:

March 1.

The only point is, whether this legacy is to be considered as a joint legacy, given to the four daughters of Collins as joint tenants, or whether they were to take 100*l.* each as tenants in common. The first question is, whether the form, in which this legacy is given, makes any difference, from what would be the case, if it was a direct legacy to be paid by the executor. That was contended to take it out of the common case; supposing a joint legacy can take place; that not being a legacy to be paid by the executor, but payable upon a condition, if it is not to be done according to the terms, it is void; and if so, three being dead, and the condition therefore having become impossible, it proves totally void; and would absolve the devisee from the payment of any sum. It is impossible to make the least distinction between a legacy to one person upon condition, to pay to four persons 400*l.* and a legacy of 400*l.* to be paid to them by the executor.

The next question is, whether according to the rules of this Court a legacy of a gross sum given to two or more without any words of severance or distribution is a gift in joint-tenancy to the persons intended to be benefited. That came before me in *Campbell* v. *Campbell*, 4 Bro. C. C. 15: where the first question was, whether there were sufficient words of severance to make a legacy a tenancy in common; supposing, there could in point of the rules of construction be any such thing as a joint legacy: and I was pressed with *Perkins* v. *Baynton*, 1 Bro. C. C. 118; in which, it was said, Lord THURLOW had expressed a doubt, whether a legacy is a subject, upon which a joint-tenancy can attach. I remember taking much time, and fully inquiring, whether there was any foundation for *that doubt; and the result [*630] of that inquiry led me to think, the report of *Perkins* v. *Baynton*

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must have been mistaken; and I took notice, that it was not the point before Lord Thurlow; for the question there was merely, whether there was a severance, or not. As the opinions of great Judges given upon points not before them have certainly not so much weight, as when the points are before them, I should on that account have paid the less regard to it: but if I was satisfied, that Lord THURLOW really doubted the point, even though it was not before him, I should have much questioned my own opinion: but I rested my opinion in *Campbell* v. *Campbell* upon *Cray* v. *Willis*, 2 P. Wms. 529, which I still conceive a direct authority by a very great Judge, Sir JOSEPH JEKYLL, upon all questions of this nature. He seems to consider, that both residuary and pecuniary legatees must be taken to be joint-tenants, unless there are words of severance, shewing an intention to make a tenancy in common; and I cannot suppose Lord THURLOW threw out that doubt: but I am relieved from difficulty by subsequent cases before Lord THURLOW, in which he makes no such doubt. In *Jolliffe* v. *East*, 3 Bro. C. C. 25, he throws out no such doubt, on the contrary, he expressly gives his opinion there, that it is a joint-tenancy or a tenancy in common, according as there are words of severance or not. The pains, he there takes, would have been thrown away, if he had any such doubt. He had the question before him, whether the legacy of 10,000*l.* was a joint-tenancy or a tenancy in common; and there is not the least hint of his having doubted, whether the subject was capable of a joint-tenancy; and therefore I believe, he never entertained such a doubt.

Then the question is, whether, if the manner, in which this legacy is given, makes no difference, which it is impossible to suppose, this legacy without any words, which can in any degree be construed a severance, is not a joint interest; and the consequence is, that it is a gift to all or to the survivor, as at law; and the deaths of the three will not vitiate the gift.

I wish to give my opinion very explicitly. Great doubts have been entertained by Judges both at law and in equity as to words
[*631] creating a joint-tenancy or a tenancy in common; *and it is clear, the ancient law was in favour of a joint-tenancy; and that law still prevails: unless there are some words to sever the interest

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taken, it is at this moment a joint-tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint-tenancy. It is true, the Courts seeing the inconvenience of that have been desirous, wherever they could find any intention of severance, to avail themselves of it; and their successive determinations have laid hold of any words for that purpose. "Equally to be divided,* equally among, between," even in law I believe, certainly in equity, create a tenancy in common: but without those words it is a joint-tenancy. But many distinctions have been raised in equity; as where persons are in trade, and have joint debts due to them; the Courts say, it could not be intended to the prejudice of the family of the deceased partner; therefore not doubting, that it would be a joint-tenancy at law, in equity they say, it could not be the agreement. So if two people join in lending money upon a mortgage, equity says, it could not be the intention, that the interest in that should survive. Though they take a joint security, each means to lend his own and take back his own. But that was never extended to grants. A voluntary bond would survive, if no intention of the party to make a severance appears. Therefore legacies, gifts, grants, &c. are both at law and in equity joint; except from the nature of the contract or from the words some intention of severance appears.

This is a legacy to four persons; and there are no words of severance; therefore it is a joint-legacy; and the whole interest survives to the survivor, three being dead; and though I agree with those, who think it the least evil, that it should be a tenancy in common, this is one of those cases, in which it is more convenient, that it should remain joint. Sir JOSEPH JEKYLL in *Cray* v. *Willis* observes the convenience, that a joint-tenancy sometimes has; that the legacy is not lost. This legacy therefore belongs to the plaintiffs.

It was then contended, that this was a specific legacy; and the plaintiffs were entitled to the value of the 300*l.* stock at the end of a year from the testator's death. [632]

* *Rigden* v. *Vallier*, 2 Ves. Sen. 252.

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The MASTER OF THE ROLLS was of opinion upon reading the will, that it was specific; observing, that on that account it was more clearly a joint tenancy; and upon the 8th of March declared as to the 300*l.* that the plaintiffs were entitled according to the value of the stock at the end of a year from the death of the testator; when it ought to have been transferred; and directed an inquiry to ascertain the value at that time; and that the remaining 100*l.* should be transferred with the dividends accrued.

1797.
Dec. 6, 7.

1798.
Feb. 10.
March 1, 5.

LOUGHBOROUGH, L.C.

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(3 Vesey, 633—650.)

A college, devisee in remainder, after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; and refusing to accept after the death of the tenants for life, the master was directed to receive a proposal, in order to have it determined, whether it could be executed *cy pres*.

JOHN ANDREW, Doctor of Laws, by his will, dated the 15th of May, 1747, and duly executed, among other things, in order to make a secure and suitable provision for his relations, relying upon the justice, care, and integrity, of the society hereafter mentioned, directed, that, as soon as a suitable purchase of freehold estates in land might be met with, all his 3 per cent. annuities in the Bank of England should be sold and invested therein, and settled to the following uses: that is, that the rents and profits thereof should be paid half-yearly to his sisters, Anne Andrew, Elizabeth Woodward, Bridget Andrew, and Lois Andrew, share and share alike, during their joint lives, and to the survivors and survivor of them; and after the death of the last survivor then to the use of the College or Hall of the Holy and Undivided Trinity in the University of Cambridge; and that the said land should
[*634] be vested in said College; which by licence of mortmain *they were enabled to take; and he directed that four new scholarships should be then founded: the scholars to be chosen to be such as should have been educated at Merchant Taylors' School, London;

† *Sinnett* v. *Herbert* (1872) L. R. 7 Ch. 232, 236, 41 L. J. Ch. 388.

who should have been in the bench or table of said school; who besides the usual allowance and payments made to the other scholars of said house should receive 5*l.* quarterly from the Bursar; and the remainder of the rents, issues, and profits, of said estates, as the same should come in, to be put out at interest upon Government or other public securities, until there should be raised the sum of 20,000*l.* to be laid out in additional buildings to said College, either according to the plan then already made, or such other as the society might think more convenient; and he directed, that so soon as the said 3 per cent. Annuities should be vested in land, the account might be made yearly of the several receipts and payments, in the same manner as the Causeway account was then kept, and at the same time; and that the Master for the time being should be allowed out of the rents and profits of the said estates 5*l.*; the Bursar like 5*l.*; and each Fellow who should be present at the making up said account, 20*s.*; and the Bursar to be allowed a salary of 20*l.* per annum for his trouble in receiving and paying the rents and profits to the testator's sisters punctually according to the directions of the will; and after the said sum of 20,000*l.* should be raised for the building, the testator directed, that four new Fellowships should be erected, and added to the then present number, upon the same footing, and subject to the same rules and statutes, and with the same provisions, allowances, and privileges, in all things as the other Civil Law Fellowships; and to be chosen and appointed in the same manner; saving, that no person should be qualified, or capable of being chosen or appointed by lapse to any of the said fellowships, unless he should have been educated at Merchant Taylors' School, and should have been in the bench or table of the said school, if any may be found fitly qualified in either of the Universities of Cambridge or Oxford: those, who are or have been scholars of the house of the said College, first to be preferred, if fit; and when the said fellowships shall be added, the said account to be discontinued and cease; and the rents, issues, and profits of the said estates to be applied to the general use of the said College: but the salary of 20*l.* per annum to be continued to the Bursar; and 10*l.* per annum to be added to the salary of the Law Lecturer.

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*The testator directed, that until a proper purchase could be met with, the aforesaid 3 per cent. Annuities should be and remain in the same fund, and the interest and dividends thereof be received by his executrix for the use of herself and her aforesaid sisters and the survivors and survivor of them share and share alike; and he desired, his worthy friends Dr. Simpson, Master of the said College, and Dr. Charles Pinfold, jun. would be pleased to assist his executrix in purchasing the said estates with the approbation of the said College; that the same might be settled according to his will: so that his sisters might receive the income thereof punctually and without trouble; and he gave to each of them 100*l.*; and in case any loss should happen, he directed, that his executrix should in nowise be answerable for it: the charge of the purchase or otherwise arising from settling the same to be paid out of the principal and not out of the interest or dividends of the said 3 per cent. Annuities. He gave to his brother, the Reverend William Andrew, 1,000*l.* Bank Stock; and to his daughters Sarah and Thomasine 1,000*l.* Bank Stock a-piece. He likewise gave to his brother, his executors and administrators, the interest of 1050*l.*, lent upon the Huntingdon and Cambridge turnpike, to be applied for the use and maintenance of his son John Andrew during his natural life, in such manner as his said brother should appoint; and in case the same should be paid off, to be placed out again at interest upon Government or other public security; and after the death of John Andrew he gave the said principal sum of 1050*l.* to the Master, Fellows, and Scholars, of Trinity Hall aforesaid, to be laid out in lands for the use of the said society towards the better enabling them to support the additional scholarships and fellowships; and until the same should be erected, the income and profits thereof to be made part of the fund intended for the additional buildings, and to be entered in the account before directed to be kept. He gave to the College the farther sum of 100*l.* and a specific legacy of plate, and he gave the residue of his personal estate and effects not before disposed of to Lois Andrew; and appointed her sole executrix.

By a codicil of the same date with his will, the testator directed, that in case his sister Bridget should survive his

sisters Woodward and Lois, as her health would not permit her to enjoy what he had given her, the College do pay her 200*l.* per annum clear of all deductions; and that the remainder of his 3 per cents. and India *Stock be applied to the account towards the additional buildings, or the profits of the estates purchased therewith; and taking notice, that since the writing of his will and before the execution thereof it had pleased God to take to himself his sister Anne Andrew, he directed, that the 1,000*l.* East India Stock thereby given to her be added to his 3 per cent. Annuities, and to the uses in the same manner and form and to all the same intents and purposes whatsoever as they were directed to be settled and enjoyed.

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The testator died soon after the execution of the will without leaving any issue. Bridget Andrew, Elizabeth Woodward, Lois Andrew, and John Andrew, survived him. At the time of making his will and at his death he was possessed of 500*l.* Bank Stock, 17,200*l.* 3 per cent. Bank Consolidated Annuities, 1,000*l.* reduced Bank Annuities of 1726, 1,000*l.* East India Stock, and 1,056*l.* due to him upon the said turnpike security, and other personal estate. The funds having never been laid out in land, and Bridget Andrew, Elizabeth Woodward, and Lois Andrew, being all dead, the latter, who was the survivor, having died in 1793, the information was filed at the relation of the Master and Wardens of the Merchant Taylors' School against the Master, Fellows, and Scholars, of Trinity Hall, and James Andrew, executor of Lois Andrew, and heir at law of the testator, praying, that the trusts of the will may be performed; and that the Master, Fellows, and Scholars, of Trinity Hall may be decreed to accept the trust; and in case the Court shall be of opinion, that they are not bound to accept it, that the funds may be laid out and disposed of under the decree of the Court for the benefit of Merchant Taylors' School and the scholars educated at the same, in such manner as the Court shall be of opinion will most nearly correspond with and effectuate the charitable designs of the testator in his will and codicil.

The College by their answer stated, that since the filing of the information they have been informed and believe, that by a deed poll under the common seal of the College, dated the 17th of

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May, 1755, after reciting the will and codicil, the death of the testator, and the probate by Lois Andrew, and that the testator was at the time of his decease possessed of the said sums of 17,200*l.* 3 per cent. Consolidated Bank Annuities, 1,000*l.* 3 per cent. Bank Annuities of 1726, 500*l.* Bank Stock and 1,000*l.* East India Stock; and that at the request of the then Master, Fellows, and Scholars, of the said College Lois Andrew had

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agreed to *transfer to the then Master, &c. and to her, the said Lois Andrew, the said funds, in trust, that Elizabeth Woodward and Lois Andrew might during their respective lives and the life of the longer liver of them receive all interest and dividends of said Bank Annuities and East India Stock; and if Bridget Andrew should survive them, then upon trust, that from the decease of the survivor of Elizabeth Woodward and Lois Andrew 200*l.* clear of all taxes and deductions might be secured and paid for the benefit of Bridget Andrew in such manner as thereinafter is mentioned; and that William Andrew might receive the dividends of said 500*l.* Bank Stock during his life; and subject thereto that said several stocks and the rest of the dividends thereof should go and be applied to and for such uses, intents, and purposes, as the same were directed to be applied in and by the said will, the said then Master, Fellows, &c. did therefore acknowledge and declare, that the said 17,200*l.*, &c. so agreed to be transferred, as aforesaid, were all the Bank Annuities, Bank Stock, and East India Stock, which the testator was possessed of at his decease, and which were bequeathed unto them the said Master, &c. in and by the said will and codicil, and which were required and intended to be transferred by Lois Andrew, as aforesaid, for the uses and purposes intended concerning the same in and by the said will and codicil: and the said then Master, &c. of the said College did thereby for themselves and their successors covenant and agree with Elizabeth Woodward and Lois Andrew and the survivor of them, their executors, &c. that they and the survivor should from thenceforth during their respective lives and the life of the longer liver of them have and receive to and for their own use and uses all the dividends and interest, which should become due during the lives of Elizabeth Woodward and Lois Andrew and the survivor on the said Bank

Annuities, Bank Stock and East India Stock, or the rents and profits of all lands and tenements, which should be purchased with the produce of said stocks; and the said then Master, &c. also covenanted for themselves and their successors with Lois Andrew, her executors, &c. that if Bridget Andrew should survive Elizabeth Woodward and Lois Andrew, the said Master, &c. or their successors, would from thenceforth during the life of Bridget Andrew pay for her use and benefit during her life to the executors or administrators of Lois Andrew, or such person or persons, and in such manner as she by her will or any writing signed by her in the presence of two or more credible witnesses should direct or appoint, out *of the dividends and interest of [*638] the said Bank Annuities, Bank Stock, and East India Stock, or the rents and profits of the lands, which should be purchased with the produce of the said stocks, the yearly sum of 200*l.* clear of all deductions; and that the said Master, &c. would pay to William Andrew during his life the dividends of the said 500*l.* Bank Stock, when and as the same should from time to time become due.

The funds were transferred accordingly; and continued to stand in the names of the Master, Fellows, and Scholars of the College and of Lois Andrew; and the dividends of the Bank Annuities and East India Stock were from time to time, as they became due, paid to Elizabeth Woodward and Lois Andrew and the survivor during their respective lives; and the dividends of the Bank Stock to William Andrew. The sum of 1,050*l.* continued due upon the turnpike security. John Andrew died in 1764; and William Andrew in 1792. The defendants, the Master, &c. of the College, stated, that since the death of Lois Andrew and William Andrew none of the interest and dividends of the Bank and East India Stock were received by them, or to their knowledge by any of their predecessors: but they admitted, that they had received from the trustees of the turnpike security all the interest due thereon since the death of John Andrew to Midsummer, 1794. They also admitted, that they decline to act in the trusts of the will, and desire to renounce the trust and refuse the bequests to them by the will and codicil upon the trusts therein mentioned, because upon mature consideration

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they are satisfied they cannot accept such trusts and execute the same without doing very great prejudice to their said College and the establishment thereof; and they submitted, that the acts before mentioned ought not to be considered as done in performance of the trusts and do not amount to an acceptance thereof; and in December, 1793, they gave notice to the relators and James Andrew of their intention to renounce.

The answer of James Andrew also stated the deed of 1755; which was in his possession.

Attorney-General, Mr. Graham, and *Mr. Stanley*, for the information:

[*639] The acts of the College amount to a clear acceptance. * The respective tenants for life received the dividends under the College; and since the death of John Andrew they received the interest of the money due upon the turnpike security themselves. This is a very important question; for if the defendants can now renounce the trust, any College may say, they will no longer execute their trust, upon the same general ground, that it will be prejudicial to the interest of the College. *Attorney-General* v. *Christ's Hospital*, 3 Bro. C. C. 165. There can be little doubt, that the legacies of 100*l.* and of the plate were accepted.

Solicitor-General, Mr. Mansfield, and *Mr. Richards*, for the College:

A body of this description are to a certain degree in the nature of trustees; and the acts of their predecessors cannot compel them to be guilty of a breach of trust. These new scholars are to be provided for, not out of the testator's funds simply, but out of the funds appropriated to the other scholars. By what authority can they be guilty of such a breach of their engagements with the other founders? The funds were transferred without any view of the subject, for any thing that appears. What passed on the occasion does not appear. There is no trace in the books of the College upon the subject. This instrument was in the possession of the family; and was not known to the College before the answer of James Andrew to the information. The interest the College received upon the turnpike security was

carried to a separate account. Very different acts would be necessary to bind them. To found new Scholarships and Fellowships they must do a solemn act to make them part of the foundation; and I apprehend, some concurrence of the visitor would be necessary. All such acts to make a new constitution are registered; and a very solemn act is always done. By the statutes of foundation new Fellows are to be accepted "*de communi omnium consilio & assensu.*" The seal of the College is no evidence of that. The different foundations are by very formal instruments: "*nos,*" &c. "*& omnes socii attendentes statuimus & ordinamus,*" &c.; and there are solemn entries in the books. In this case even a common person would not be bound in equity. In *The Duke of Montague* v. *Lord Beaulieau*, 6 Bro. P. C. 232; Ib. 7, 303, notwithstanding the strong acts done, yet as the subject had not come clearly under the consideration of the party, and there was no distinct agreement to perform the condition, it could not be compelled. There are many other cases, where parties have been held not bound even after having received great benefits. * This is going a great way farther; attending to the rule of the Court as to election, very clearly laid down in *Boynton* v. *Boynton*, 1 Bro. C. C. 445. The case of *Christ's Hospital* was not a foundation of any new establishment: but there had been a misconstruction of the intention. They were perfectly competent to do what was directed. It had nothing to do with their actual establishment. The question was merely, whether the meaning of the testator was, to impose a condition upon the Hospital to take six children from the parish, or that they should take six, in case the rents and profits according to the usual application would maintain six. They had upon their construction educated only three. At the time of the information the produce was equal to maintain six. The information insisted upon a retrospect; which the Court did not grant; and it ended simply in a declaration, that they ought to receive six at the nomination of the churchwardens and overseers of that particular parish. The decree sought in this case is quite different. It is to make an addition to the establishment, not to proceed upon the footing of the ancient establishment; and that new establishment is to have

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the effect of communicating to the objects of it all the advantage of the old. In this case a simple acceptance would not bind the successors. There must have been a formal incorporation. Nothing is more inconvenient to a College than to be bound to take members from a particular school. No person has been injured by what the College has done; nor have they received any benefit. The object could not be enforced with any effect till this time on account of the tenants for life. What do these acts amount to but the preservation of the funds? They cannot be bound by the general expressions in the deed, "at the request of the College," &c.; which are mere words of course.

Mr. Lloyd, *Mr. King*, and *Mr. Wear*, for the next of kin, contended, that if the College were not bound, the object being distinctly marked out and defined, the Court had no power to supply any other.

Reply:

The College received the interest upon the turnpike security for thirty years, subject to no trust under that deed but the general charitable purpose. If any thing turns upon the in-
[*641] stances *of foundation alluded to, there ought to be an inquiry into the power of the College to receive an accession of Fellows, and the particular circumstances of this deed. They possess themselves of the fund, enter into covenants, give a release to the executrix and authorise the executrix to say, these are the only funds applicable to this purpose. Did they mean to take the trust upon them merely for the benefit of these persons for life and then for the next of kin? By their declaration, that these were all the funds bequeathed to them, &c. they mean, that these were all the securities, the testator had made the capital of a charitable fund; and the deed refers to all the purposes of the will. It is very difficult to distinguish this from the case of *Christ's Hospital*. The Master's report there stated, that though the funds were then sufficient, they probably would not be long so; but still the LORD CHANCELLOR said, they were capable of accepting, and had accepted.

LORD CHANCELLOR:

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Feb. 10.
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I had directed this cause to be set down for judgment; having formed my own conclusion upon it; that the College had done nothing to conclude them as an acceptance of the bequest. They put themselves in the trust of the money; but no farther. But I have considerable doubt, what will be the consequence of that; which was not discussed so much as it ought to be. My opinion turns upon this: I have no right to force them to take it. They have done no act, that can conclude themselves. Upon the deed poll and the other proceedings nothing more was intended than merely to secure the property; saving to the representatives of Dr. Andrew what would have been the expense of the suit, if they had declined putting the funds under the care of the College. Then the idea, that I took up, perhaps a little hastily, was, that, if the College refused, the will was void. That is not quite clear; because, being to a College, the Statute of Mortmain does not affect it; then it is a bequest to a given purpose; which purpose cannot take effect; and what will be the consequence of a thing so bequeathed I am not quite prepared to say: whether there can be any mode of executing it *cy pres*: or whether, if there is no use, that I can execute, I must give it to the representatives.

March 1.

Upon the 1st of March, 1798, this cause was again argued upon the whole case: the following entries having been in the interval *since the former argument discovered in a manuscript book of the College, entitled "Lease Book" beginning 1735 and ending in 1768. [*642]

Letter of attorney from the Master, Fellows, and Scholars of Trinity Hall Cambridge to Lois Andrew and Elizabeth Woodward to receive dividends of the 3 per cent. Bank Annuities following; of which John Andrew Doctor of Laws was possessed at his death: that is to say; 1,000*l.* Bank Annuities 1726: 1,000*l.* Bank Annuities 1731: 1,400*l.* Bank Annuities 1742: 1,500*l.* Bank Annuities 1743: 8,200*l.* Bank Annuities 1744: and 5,100*l.* Bank Annuities 1745: all which the said Lois Andrew, the sole executrix of the said John Andrew, hath agreed to transfer to the said Master, &c. of Trinity Hall, to the intent, that the same

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may be secured for the uses intended by the will of the said John Andrew, upon their undertaking to empower the said Lois Andrew and Elizabeth Woodward and the survivor of them for the purposes contained in the said will—dated 18th January, 1750.

Letter of attorney from the Master, &c. to Lois Andrew and Elizabeth Woodward to receive dividends upon 1,000*l.* East India Stock, late the property of Dr. John Andrew; which Lois Andrew, his executrix, had also agreed to transfer to the said Master—dated 18th January, 1750.

Letter of attorney from the Master, &c. to Mr. William Andrew to receive dividends upon 500*l.* Bank Stock, late the property of Dr. John Andrew; which Lois Andrew had agreed to transfer to the said Master, &c.—dated 18th January, 1750.

Letter of attorney from the Master, &c. to

to accept for us and in our names the several sums of 3 per cent. Bank Annuities mentioned in the aforesaid letter of attorney to Lois Andrew and Elizabeth Woodward, to be transferred to us by Lois Andrew the executrix of John Andrew, deceased—dated 21st January, 1750.

Two similar letters of attorney of the same date from the Master, &c. to accept 1,000*l.* India Stock and 500*l.* Bank Stock.

Letter of attorney from the Master, &c. to Edward Simpson and Charles Pinfold, Doctors of Law, for us and in our names to accept all such transfers as may be made to us at any time hereafter of any interest in the capital stock of 3 per cent. Annuities created by the Act of 25 Geo. II., jointly with Lois Andrew of, &c.—dated 23rd July, 1753.

[613] Three similar letters of attorney of the same date to accept 1,000*l.* East India Stock; 500*l.* Bank Stock; and 1,000*l.* Million Lottery Stock.

Letter of attorney from the Master, &c. to Lois Andrew and Elizabeth Woodward to receive the dividends of 17,200*l.* 3 per cent. Annuities; which are to be transferred by the said Lois Andrew, as executrix of John Andrew, into the joint names of us the said Master, &c. and Lois Andrew—dated 7th January, 1755.

The deed-poll and declaration of trust of the several Government Stocks 17th May, 1755, already produced.

Letter of attorney, to the like effect as the three last-

mentioned, from the Master, &c. to William Andrew to receive dividends upon 500*l.* Bank Stock—dated 17th May, 1776.

Letter of attorney from the Master, &c. under their common seal, to Godfrey Lee Farrant jointly with Lois Andrew to accept a transfer, which would be made unto said Master, &c. jointly with Lois Andrew by said Lois Andrew, as sole executrix of the will of John Andrew, from the account of the said John Andrew of 17,200*l.* 3 per cent. Bank Annuities—dated 7th April, 1756.

Three similar letters of attorney of the same date to accept transfers of the 1,000*l.* 3 per cent. Bank Annuities 1726; 500*l.* Bank Stock; and 1,000*l.* East India Stock.

Letter of attorney from the Master, &c. under their common seal, to Lois Andrew and Elizabeth Woodward to receive the dividends upon the 17,200*l.* 3 per cent. Bank Annuities; which would at some time hence be transferred unto said Master, &c. and Lois Andrew jointly by Lois Andrew, as executrix, &c.—dated 7th April, 1756.

Letter of attorney of the same date from the Master, &c. and Lois Andrew to Elizabeth Woodward to receive the dividends of the 1,000*l.* 3 per cent. Bank Annuities 1726; and to William Andrew to receive the dividends upon the 500*l.* Bank Stock.

Upon these entries it was again strongly contended for the relators, that the College was bound. On the other hand it was insisted, that they did not vary the case.

Upon the other point: [644]

For the information:

The question is, whether, devises to Colleges being excepted by the Statute, the Court can give it to any other College that will accept it; and apply it as near as may be to the purposes of the charity. There are many cases, in which personal funds being given so attached to purposes not legal within the Statute, questions of this kind have been decided in favour of the next of kin: that is; wherever the doctrine of *cy pres* has been pressed, the Court have thought, they must find in the will a general intention for charity predominant over the particular charity: but they have uniformly said, that if a personal fund is so given, that a particular purpose is specifically pointed at, as

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the purpose the testator wishes to effectuate, the Court will not seek for another purpose. Is the intention so specific with respect to Trinity College, that in executing it the Court must hold, that his purpose would fail, if this is given to any other College? In arguing, that his purpose would not fail, there is great difficulty from the particular benefits to the Bursar and others, and the large sum of 20,000*l.* for additional buildings to that College. It is difficult to apply those to other Colleges: but there is this difference between this case and those alluded to: in this the particular purpose of the testator is not illegal; but fails, because the trustees will not execute the trust. In the case of *Wheatley Church*,* and many others the particular purpose was illegal; and the Court said they could not detach the application from that illegal purpose, and apply it to some other purpose, that is legal. Here the caprice of the trustees steps in between the legal intention and the execution of it. * * *

[645]

For the next of kin:

The doctrine of *cy pres* as applied to charities, which was formerly carried to a great length, as in *Baxter's* case, 2 Vern. 248, and *De Costa* v. *De Pas*, Amb. 228, has been much shaken by the late cases: *Attorney-General* v. *Bishop of Oxford*, 1 Bro. C. C. 444, n.; *Attorney-General* v. *Goulding*, 2 Bro. C. C. 428. * * The ground of this doctrine must be, that the Court is perfectly satisfied, that by those means they would execute the intention as nearly as possible. Here the intention is too precise. By applying this to another College the Court may act contrary to it. They must be convinced beyond all doubt, that if this failed, he would have given it to another College.

Reply:

All the cases, with a very few exceptions, are, that upon the doctrine of *cy pres* as to charities you may substitute one general legal intention for a particular illegal intention; but you shall not substitute one particular legal intention in the place of a particular illegal intention expressed. The subject is very well discussed by the MASTER OF THE ROLLS in *Attorney-General* v.

* *Attorney-General* v. *Bishop of Oxford*, 1 Bro. C. C. 444, n.

Boultbee.† A decree adding four Fellows and Four Scholars, and limiting them to the produce of this estate, would be good upon all the cases of *cy pres*; and would be much nearer the intention than giving it to another College. If where the testator has imperfectly expressed his intention as to the mode, in which the charity is to be constituted, the Court will find a mode, why not, where the mode, with regard to which he has expressed his intention, fails. *The Attorney-General* v. *The Bishop of Oxford*, though hardly a decision, does raise some difficulty. If the testator can be taken to mean only to build a church, and not repair the chapel, to build a church at Wheatley upon the site of the chapel only, it must be so: but I cannot believe that to be his intention. It can only amount to this; that it is a case, in which the Court was of opinion, the intention was to do one thing and to negative every thing else.

LORD CHANCELLOR: [646]

I take it to be only the note of what Lord KENYON might have said in answer to the proposal to augment the living: which perhaps might have been a wiser thing than making a larger church: but it was not the testator's idea. It is impossible to suppose, he meant the church to be built directly over the chapel, to include it.

I may modify the objection by permitting even fewer persons, than the testator has proposed, to be brought in. If not, the testator must be taken to have meant the benefit of a College; and, rather than the charity should fail, I must try, if there is not another College, that would become the trustee upon the terms proposed.

I feel no difficulty with regard to the proposition, that the College was competent to accept, to refuse, or to suspend their decision either to accept or refuse. The first question under the circumstances for me to consider is, whether any act has been done, that is a positive acceptance, and such as ought to bind them, and such as deprives them of the power at any given time or under any given circumstances to retract that acceptance. I am bound to put this construction upon the deed of 1755 upon

† 2 R. R. 265.

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what passed after the death of Doctor Andrew; that they meant by that neither to accept nor positively to refuse; and they have done nothing by it, upon which by any fair and honourable construction of the transactions between them and the next of kin, the only persons with whom they were dealing, I should deem them decidedly to have accepted the benefits, and therefore to have bound themselves to perform the duty, which would follow upon the acceptance of the benefits, the testator intended to the College. In the first view of it and soon after the death of the testator there was an intention, never carried into act, upon the part of the College to have at once accepted; to have taken possession of the funds; and if they had done so, they must have taken upon them the duty. From the several acts, the letters of attorney, an express deliberate purpose appears. They have gone all the length except the final execution to have invested themselves with all the fund. One cannot but by conjecture imagine what interfered *that arrested that intention, [*647] they had conceived; but after deliberate consideration the deed of 1755 was executed; by which nothing was done but this: for the preservation of the fund, for preventing an immediate suit as to the application, and to have brought on a decision upon the effect of the bequest, they joined themselves with the executrix *quâ* trustees of the several funds directed to be applied. By these means any dilapidation and accident to the fund was for the time prevented. They engage, and properly engage, that the dividends should be applied according to the will to the full extent of those dividends. They covenant, and properly, with regard to Bridget's interest, (to whom it was the same, whether it continued money, or was laid out in land, for she was to have 200*l.* a-year) that, be the condition of the fund what it may, she shall have that sum; and there is a general reference to the will; that the funds are to stand in their names and that of the executrix generally upon the trusts of the will. Ought I to infer from this, that they had decided to take the benefit of this bequest, and in consequence of that decision to execute the purposes of the will? Their conduct in that view of it would expose them to a considerable degree of reproach; because they were upon that supposition guilty in collusion with the next of kin of

conduct tending to defeat *pro tanto* the execution of the will, and make to a very substantial effect a different destination of the property of Dr. Andrew; and you will see immediately, when I state it, what a difference it would make as to the final disposition. Supposing them to have frankly accepted, their duty was to have done, what this Court would inevitably have directed, to have sold the stock, to have found out a purchase, and to have invested the fund in a purchase of land. The rents and profits would have gone to the relations of the testator during their lives. The effect would have been, that they would have sold all the funds at par, or rather above par: they would have bought land at 24 or 25 years purchase. Instead of that, the fund remaining stock, the whole dividends were received by the persons entitled for life. They have received one-fifth more, than the testator intended, by collusion with the executrix and the persons, who conducted this affair on behalf of the College. To say the best, it is an unhandsome supposition: but it is a supposition, I am not entitled to make; for it is such a way of dealing with the will, that I would neither suffer a devisee nor a trustee to practise: but they placed themselves in that neutral state; no person calling upon them to make an option. Perhaps to call upon them immediately would * have been more, than the [*648] Court would have done under these circumstances, at that period; when there were no ready money funds, no actual estate. I doubt much, whether the Court would have called upon them at that moment to decide, whether they would accept. Perhaps the Court would have sold the stock, and would have directed an account, and cleared the fund; reserving the question as to the election to be considered under the existing circumstances, when the fund was cleared; for the circumstances, under which the College might have then found themselves, would have made a material ingredient, to which the Court would have been bound to give some attention. Therefore I cannot hold, that they have made an absolute, definitive, election to accept this trust: but undoubtedly they accepted the administration of the property and are accountable for all, that came to their hands: but I go a little farther; for I think, while all things remained embarrassed, it would have been much too strong for the Court to have said,

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there was not room for the present members to review the decision, their predecessors had made, and to desire not to be compelled to abide by it.' It is an infinitely more favourable case than that of the *Duke of Montague*. The acts done have been a prejudice to nobody. No injury has been done to any person. There is no ground therefore, upon which I can, as applying myself to the consciences of the gentlemen of the College, controlling their judgment, state to them, that, whatever may be their opinion upon the inconvenience of it to the College, they are bound in conscience to put themselves to the inconvenience, and the College under what they conceive a disadvantage, upon the acts done so many years ago by their predecessors. Their answer in conscience is, here are all the funds: what interest we have received here is an account of: it will go into the fund: but we desire to stand clear of any disposition to be made by the intention of Dr. Andrew; thinking, they did not mean to bind themselves; but that their whole acts amount only to this; that they took a step engaging themselves to nothing but to act fairly and honestly as trustees with regard to the trust fund.

As to the other part of the case, it is not fit to decide upon it without giving an opportunity to state any proposal with regard to this charity. I have not looked at all the cases referred to.

[*649] *Some of the cases seem to have gone the length of raising an idea, that the doctrine of *cy pres* as to a charity ought never again to be mentioned in this Court. I am not quite clear of that.

This case, the devise being for a College, is quite clear of the Mortmain Act. It is not affected at all by it. The purpose of the testator is clearly out of the provision of the statute. Its being to be laid out in land makes no difference. It does not fail either from any imputation, that can be cast upon the intention of the testator; for he was not devising any folly, impracticable in itself. All could be done, if the College would have accepted it. The execution of his purpose for a charity directed to a course of education is frustrated by events contingent and quite independent of the purpose; as if the trustees, according to whose discretion a charity was to be adopted, had died. It is fit to see, what sort of proposal can be stated upon it. It would

come near the purpose, if Trinity Hall would not admit them as Fellows, but were willing to let them stand as Exhibitors. That would be near the purpose of the intention. I do not know, that it would wander very widely from the intention, if any other College was disposed to receive Fellows so well endowed as these Fellows probably will be. What I proposed to do was to dismiss the information, so far as it prays, that the College may be bound by the directions of the will with regard to the establishment of laying out the money upon buildings, and providing for the addition of four Scholars to be Fellows; to direct an account of the money received by the College; to direct the College to transfer the stocks: the turnpike security still remaining out, the bond to be deposited with the Master; and the interest in arrear upon it received by the College to be paid in: all parties to have their costs out of the estate; reserving farther considerations until after the Master shall have made his report; directing him to receive any proposal made to him on the part of Merchant Taylors' School for the establishment of a charity within the terms of the will of Dr. Andrew.

If they can find the means to lay a proposal of an establishment with regard to the four Scholars, such number of Scholars as they think that school will afford, I should wish to have a *particular object for my consideration, whether that object is so near the intention, that I can execute it. [*650]

The decree was drawn up accordingly.†

† This decree was affirmed by the House of Lords, on the 20th February, 1800.

1798.
Feb. 5, 8, 13, 17.
March 15.

Rolls Court.
ARDEN, M.R.

On Appeal.
1800.
March 10, 13, 14.

LOUGHBOROUGH, L.C.

[696]

[696—707]

FORSTER *v.* HALE.*

(3 Vesey, 696—713; 5 Vesey, 308—322.)

The Statute of Frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it.

The Lord Chancellor upon appeal held that the case was not within the Statute of Frauds: the question being, whether a partnership subsisted in the trade of a colliery; a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing, as an incident to the trade, by operation of law.

A partnership in land may be proved by parol evidence.

IN 1790 Joseph Forster, Robert Rankin, William Kent, and John Burdon, carried on the business of bankers under the title of "The Commercial Bank at Newcastle." In June, 1791, a lease of a colliery, called Hebburn, was granted by Henry Ellison to John Burdon and three other persons of the names of Peareth, Wade, and Wren, for a term of thirty-one years, as tenants in common, in equal fourth parts. Mr. Burdon died in December, 1792. The bill was filed by Forster and Rankin against the executors of Burdon praying, that it might be declared, that Burdon took and held the said fourth part of the colliery on account of himself and the plaintiffs, and the defendant Kent respectively in equal shares; and that the defendants might be decreed to assign the same accordingly.

[There was no evidence to show that Burdon's name was originally inserted in the lease on behalf of the Bank. The plaintiffs and Kent resided at Newcastle. Burdon resided at Hardwicke, in Durham, about twenty-six miles from Newcastle; and for several years before his death he had not left his house.

Several letters from Burdon to Kent written subsequently to 1791 were produced by the plaintiffs in evidence of the alleged trust, and the defendant Rowntree, who acted as Burdon's attorney, by his answer stated that in August, 1792, by Burdon's direction he prepared a deed stating that Burdon's fourth share of the colliery was held in trust for Burdon and the plaintiffs and Kent in equal shares, which deed Burdon subsequently refused to execute.

* *Gray* v. *Smith* (1889) 43 Ch. D. 208, 59 L. J. Ch. 145.

The MASTER OF THE ROLLS was of opinion that the letters above referred to coupled with other evidence constituted a sufficient declaration of trust by Burdon of his fourth share of the colliery to satisfy the Statute of Frauds, and in the course of his judgment the

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MASTER OF THE ROLLS observed :]

It is not required by the statute, that a trust should be created by a writing; and the words of the statute are very particular in the clause respecting declarations of trust. It does not by any means require, that all trusts shall be created only by writing; but that they shall be manifested and proved by writing; plainly meaning, that there should be evidence in writing, proving, there was such a trust. Therefore unquestionably it is not necessarily to be created by writing: but it must be evidenced by writing; and then the statute is complied with; and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit, it must be proved *in toto*; not only that there was a trust, but what it was. * * *

[707]

On Appeal to the LORD CHANCELLOR (Lord LOUGHBOROUGH):—

1800. *March* 10, 13.

[On behalf of the defendants it was observed, that the question was whether there was a declaration of trust within the Statute of Frauds.]

[5 Ves. 308]

The LORD CHANCELLOR observed, that was not the question: it was, whether there was a partnership: the subject being an agreement for land, the question then is, whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact, that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of law held for the purposes of that partnership. * * *

[5 Ves. 309]

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[309]

The *Solicitor-General* and *Mr. Steele*, for the plaintiff; and *Mr. Romilly*, for the defendant, Kent, in support of the decree. * * *

5 Ves. 311]

The *Attorney-General*, *Mr. Mansfield*, *Mr. Lloyd*, *Mr. Richards*, and *Mr. Wear*, for the defendants, the appellants:

The first question is a mere question of Equity: whether there is a declaration of trust sufficiently manifested by writing. Supposing, the bill cannot be sustained upon that point, the next question is purely a legal question, and a question of fact; whether under the circumstances, taking the whole of the evidence, the plaintiffs are to be considered as partners with Burdon in the colliery. The MASTER OF THE ROLLS determined solely upon the first question. There is nothing in these letters authorising the Court to raise a trust. * * *

At least the appellants are entitled to an issue.

The *Solicitor-General*, in reply. * * *

1800. *March* 14.

LORD CHANCELLOR:

[5 Ves. 313]

Upon the first view, which I had of this case, both upon reading the petition of appeal, and when it was stated in Court, and upon looking afterwards to the Report of the manner, in which the cause was argued at the Rolls, it seems to me, that the plaintiffs had undertaken a difficulty, which it was by no means necessary for them to encounter. It was treated as a case, in which the whole question would arise upon the operation of the Statute

[*5 Ves. 314]

of Frauds. I presume, the deed, which was *prepared, not having been executed by Mr. Burdon, the parties not looking much farther than that point, the contest arose upon the idea, that it was necessary, that or some other deed should be executed, to conclude the matter between them; and, no deed having been executed, the defence was taken.

The case appeared to me in rather a different point of view. From the nature of it it seems to me, there was no occasion to affect the estate in the land: nor has the decree done so. It has not transferred the legal interest in the share of the colliery to the plaintiffs. The case is merely a case of agreement to share

profit and loss in the trade of a colliery; which does not at all affect the ownership of the land; which is often carried on for a great number of years without any estate in the land given to those, who are to share the profits. Nothing is more common, than, where a man is tenant in fee of land, where there is a coal work, he partly sharing the rent and the profit carries it on by mere licence with other persons concerned in the business of the colliery. It is therefore merely the case of an agreement, which may or may not be within the fourth section of the statute. But this particular case is not even within the fourth section; because it was to be executed immediately; and such an agreement, to be executed immediately, requires no writing signed by the party: but such agreements may be, and are daily, proved for and against the parties entering into them by any fair, competent, credible, evidence: papers unsigned, not in the form the statute requires, are the best species of evidence: when I say, the best, I do not know how to make a difference between that and the acts of the parties, but that the latter are sometimes ambiguous: parol declarations: even these are admissible evidence; and if they are clear, consistent and intelligible, will prevail.

With this idea of the case, if it had been brought originally before me, it is probable, an issue might have been directed: but from the idea I have of the case it would have been an act of mere indolence in the Court to have directed an issue; for the case appears proved in the strictest manner by the written evidence; which cannot admit of any twist or turn by any possible parol evidence, that can be given. My view of the case therefore, though it does not exactly take the course of the argument at the * Rolls, leads me perfectly to agree with the decree. I think, they had no occasion; but undertaking to establish a trust within the strict line of the statute, the seventh section, I think, they have done it; and I perfectly agree with the MASTER OF THE ROLLS in adopting that letter of Mr. Burdon as a clear declaration of trust: when I say that, I mean, clear evidence in writing, that there was a trust. It is not necessary, that it should be a declaration: but a writing signed by the party may be evidence of a trust admitted in that writing, signed by him. * * *

[*5 Ves. 315]

The decision of the Master of the Rolls was affirmed.

1798.
March 15, 16, 17.

LOUGH-BOROUGH, L.C.

[714]

ATTORNEY-GENERAL *v.* BOWYER.*

(3 Vesey, 714—730.)

Upon a devise to trustees in favour of a corporation to be thereafter formed for a good charitable use the heir has no right to the rent and profits accrued, before the devise is carried into effect.

The general charitable purpose of the testator shall be executed upon the doctrine of *cy pres*, though the particular purpose fails.

An account decreed and a receiver appointed upon the laches of the heirs, substituted by decree as trustees to execute a devise to charity.

Devise upon a future contingency; and no intermediate disposition of the rents and profits; a resulting trust for the heir.

The jurisdiction of the Court of Chancery upon Informations for establishing charities arose since the reign of Elizabeth.

Feoffment to the use of the poor generally is good.

SIR GEORGE DOWNING being seised or entitled in fee-simple of and to divers freehold and copyhold estates in the counties of Cambridge, Bedford, and Suffolk, and being possessed of leasehold premises in the same counties, which he held by leases for lives, or years determinable upon lives, or for years absolute, by his will, dated the 20th of December, 1717, having previously surrendered certain copyhold estates to the use thereof, gave all his manors, lands, tenements, and hereditaments, both freehold and copyhold, as well as leasehold for years, in the counties of Cambridge, Bedford, and Suffolk, and elsewhere, unto the Earls of Salisbury and Carlisle, Nicholas Lechmere, John Pedley, and Robert Pullyn, Esqrs., to hold the same unto them, and their heirs, executors, and administrators, according to the nature thereof, upon the trusts after declared: viz. as concerning such part, whereof the testator was seised of any estate of inheritance or freehold, to the use of Sir Jacob Garrard Downing for life; remainder to trustees to preserve contingent remainders; remainder to the use of his first and other sons successively in tail male; remainder to the second, third, fourth, fifth, and other, sons of the testator's uncle Charles Downing successively in tail male; remainder to Thomas Barnardiston, son of the testator's aunt Barnardiston, and his first and other sons in the same manner; remainder to the second and other sons of his said aunt successively in tail male; with similar limitations in strict settle-

* *Abbott* v. *Fraser* (1874) L. R. 6 P. C. 96, 44 L. J. P. C. 26.

ment to Charles Peters, and his first and other sons, and to his brother John Peters, and his first and other sons, successively; remainder to the use of the said trustees and their heirs; in trust, that they should as soon as might be, out of the rents and profits of the premises purchase the inheritance and fee-simple of some piece of ground in Cambridge convenient for a College; and should thereon build all such houses, edifices, and buildings, as should be fit for that purpose; which should be called Downing College; and he directed, that a charter should be sued for and obtained for founding such College and incorporating a body collegiate of that name within the University of Cambridge; and that such College should consist of such Head or Governor, and of such scholars, members, and other persons, for the time being, and should be maintained, governed, and ordered by such laws, rules, and orders, and in such manner, and therein should be professed * and taught such useful learning, as his said trustees [*715] and their heirs by and with the consent and approbation of the Archbishops of Canterbury and York, and the Masters of Saint John's College and Clare Hall in the said University in being at the time of founding the said College should prescribe, direct, and appoint; and that immediately after founding and incorporating such College or body collegiate the trustees and their heirs should stand seised of all the said manors, lands, &c. in trust for the said collegiate body and their successors for ever.

And as and concerning the said manors, lands, and premises, wherein the testator was possessed of any estate for any term or terms of years, he declared and appointed, that the said trustees, their executors and administrators, should stand possessed thereof in trust from time to time to assign the same to such person or persons as should be entitled to the actual possession of his lands of inheritance by virtue of the limitations aforesaid; and he gave all his goods and chattels to Sir Jacob Garrard Downing; and appointed him executor. By a codicil to his will the testator gave some annuities, charged upon all his lands.

The testator died upon the 20th of June, 1749, without issue; leaving Sir Jacob Garrard Downing, son of Charles Downing, his heir-at-law; who entered upon the freehold, copyhold, and leasehold, estates of the testator; and enjoyed them till his death in

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1764. He never had any issue and Thomas Barnardiston, Charles Peters, and John Peters died in his life without having had any issue; and there never was any other son of Charles Downing or of the testator's aunt Barnardiston. All the trustees died in the life of Sir George Downing.

Sir Jacob Garrard Downing by his will, dated the 12th of August, 1763, gave to his wife Dame Margaret Downing, charged with the payment of several annuities and legacies, all his manors, messuages, lands, tenements, and hereditaments, goods, chattels, and personal estate, to her, her heirs, executors, administrators, and assigns, for ever; and appointed her sole executrix.

Sir Jacob Garrard Downing died without issue on the 6th of February, 1764; and his widow proved his will.

Lady Downing entered upon all the said freehold, leasehold, and copyhold estates devised by Sir George Downing. Upon the 9th of May, 1764, the information was filed against Lady Downing and the heirs-at-law of Sir Jacob Garrard Downing and the other proper parties; praying, that the will of Sir George
[*716] Downing might be established, and the *trusts thereof carried into execution; that an account might be taken of the money received by Lady Downing from the rents and profits of the said freehold, copyhold, and leasehold, estates, become due after the death of Sir Jacob Garrard Downing; and that a receiver might be appointed. The cause was heard on the 19th and 27th of May, and the 11th of July, 1767, before the LORD CHANCELLOR, assisted by the MASTER OF THE ROLLS and Lord Chief Justice WILMOT; who upon the 17th of June, 1768, declared their unanimous opinion, that the trusts of the charity in question ought to be carried into execution in case His Majesty should be pleased to grant his royal charter to incorporate the College and his royal licence for such incorporated College to take the devised premises in mortmain. The cause was farther heard upon the 31st of January, the 3rd, 6th, and 9th of February, and the 3rd of July, 1769, before the LORD CHANCELLOR; upon the last of which days his Lordship did declare and decree, that the will and codicil of the said testator Sir George Downing is well proved; and the same ought to be established, and the trusts thereof performed and

carried into execution; particularly the trusts of the said charity, in case the King shall be pleased to grant his charter to incorporate the College and his royal licence for such incorporated College to take the devised premises in mortmain; and doth order and decree the same accordingly: and the defendants, the heirs-at-law of the said testator, are to be at liberty to apply to the Court for that purpose; and doth declare, that the freehold estates purchased by the said testator after the making of the said will did not pass by virtue of the codicil; the will not being thereby republished; and that the leases, which were renewed, or were run out, after the making of the will and before the testator's death, did not pass by the will, but fell into the residue of the said testator's personal estate; and that the copyhold estates of the said testator not surrendered to the use of his will descended to his heir-at-law; and doth likewise declare, that the annuities given by the said codicil ought to be satisfied in the first place out of the personal estate; and that the real estate is only charged therewith, in case the personal estate is deficient, and doth order and decree, that it be referred to Mr. Lane, one of the Masters of this Court, *to inquire, what is the annual value [*717] of the premises devised to the charity; in order to enable the heirs-at-law of the said testator to form a judgment, what number of fellows and scholars can be maintained by the endowment; and that they are to be at liberty to contract for a piece of ground within the University of Cambridge, whereon to found the said College conditionally in case the charter and licence shall be granted by the Crown; and it being suggested, that certain buildings on part of the devised premises are so constructed as to be moveable from place to place, it is further ordered, that the said Master do inquire, what is the nature of such buildings, and state the same with his opinion thereon and all circumstances relating thereto to the Court: and it is further ordered, that the said Master do inquire into the state of the said testator's unredeemed mortgages at the time of his death, and state what he shall find concerning the same to the Court; and any directions touching the said inquiries were reserved until after the Master should have made his report thereon; and all parties were directed to produce upon oath all books, papers and

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writings to be examined upon interrogatories; and all parties were to be paid their costs out of the testator's real estate; and the consideration of all farther directions was reserved, until after the Master should have made his report and any of the parties were to be at liberty to apply to the Court, as there should be occasion.†

By indentures of lease and release, dated the 9th and 10th of November, 1768, being the settlement previous to the marriage of Lady Downing and Sir George Bowyer, all the freehold and leasehold estates of Lady Downing were conveyed to trustees and their heirs, and the sum of 93,000*l.* Reduced Bank Annuities and all other the personal estate of Lady Downing were assigned and transferred to the said trustees, upon trust after the marriage, as to 83,000*l.*, part of the said Bank Annuities, and the said freehold and leasehold estates, from time to time to transfer and convey the same according to the appointment of Lady Downing alone, and without Sir George Bowyer, by any deed or writing attested by two witnesses; and until such appointment, in trust for her sole and separate use; and upon farther trusts therein mentioned, in case of no appointment; and as to the jewels, rings, plate, pictures, linen, household goods, and furniture, upon trust to permit Lady Downing to use and enjoy, and to give and dispose of, the same, as she should direct or appoint by writing under her hand, as if she was sole; and in default of, and as to such part, whereof there should be no gift or disposition, in trust for Lady Downing, her executors and administrators; and as to all such moneys as should be re-

[*718] covered *from the estate of Sir Jacob Garrard Downing, and as to all such other moneys, as were then due to Lady Downing, either in her own right, or which might become due, owing, or belong, to her, or to Sir George Bowyer in her right, and all other the personal estate last before mentioned, save the said jewels, rings, &c. upon trust as soon as conveniently might be after the same should come to their hands, to lay the same out in Government or real securities at the choice of Lady Downing alone, without her intended husband, subject to the same trusts as the said 83,000*l.* Bank Annuities, and the real and leasehold

† Amb. 550, 571.

estates; and as to 10,000*l.* being the remainder of the said 93,000*l.* Reduced Bank Annuities, upon trust during the joint lives of Sir George Bowyer and Lady Downing to pay the dividends to Lady Downing for her separate use; and in case she should die, and Sir George Bowyer should survive her, to transfer the principal to him for his own use; and in case she should survive, to transfer the same to her.

The marriage took place. Lady Downing died in September, 1778, having made her will duly executed, giving to her husband Sir George Bowyer, all her lands, manors, and tenements, in the county of Suffolk, and a legacy of 7,000*l.* over and above what was settled upon him by marriage. Then, after giving some houses to her niece Diana Say and several legacies she gave to Jacob John Whittington all the remainder of her personal estate, and likewise all her leasehold estates in the counties of Cambridge and Bedford, to him and his heirs for ever; and appointed him sole executor.

No proceedings were had under the decree, except that the costs were paid out of the rents and profits of the real estate, until the 18th of January, 1799, when a bill of revivor and supplement was filed, praying, that the defendant Whittington might admit assets of Lady Downing to answer what was owing from her at her death in respect of the rents and profits of the estates in question, late the estates of Sir George Downing, or might account for her personal estate; and that the proceedings might be revived, and the decree carried into execution; and that the money, which should appear due from Lady Downing at her death, &c. should be paid by the defendants, Whittington and the other legatees under her will, or out of the sum of 115,000*l.* Reduced Bank *Annuities, composed of the said 93,000*l.* and additional purchases made by Lady Downing, and also East India Bonds, vested in trustees. [*719]

An order of revivor was made in 1781; and there were several subsequent orders for the same purpose. The last was by a decree made at the Rolls upon the 16th of February, 1795; and upon the 18th an order was made for a separate report as to the annual value of the premises devised.

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The Master by his separate report, dated the 1st of July, 1796. stated the several estates, and the rents, at which they were let, to the annual amount of 4,104*l.* 5*s.* 5*d.* and that all the said estates were devised in the charity, except one messuage with about 80 acres and 18 poles of land in the parish of Tadlow in the county of Cambridge, held under a lease from King's College; which having run out in the testator's life was not renewed until after his death; and therefore did not pass by his will; and he found, that the said 80 acres, &c. are in the occupation of William and Richard Lunnis and William Symonds: but no evidence had been laid before him, that enabled him to distinguish the particular lands, or the value thereof. In the schedule to his report the Master set forth the rental of all the estates, including the said leasehold premises: the quantity and annual value whereof he conceived too trifling to interfere with the object of the inquiry. The Master farther stated, that the testator was seised and possessed of other estates in the county of Suffolk, now in the possession of Sir George Bowyer, the rental of which amounts to 474*l.* per annum; and that it appears by the examination of Sir George Bowyer and the answer of Lady Downing and the admission of the heir-at-law of the testator, that certain parts of the last-mentioned estates consist of freeholds purchased after the date of the will and of copyholds not surrendered to the use of the will, and which are declared by the decree not to have passed by it; and that it likewise appears from the examination of the defendant Sir George Bowyer, that such freeholds and copyholds are so intermixed with other parts of the said estates, that he is incapable of distinguishing the same; he therefore finds himself unable at present to certify the annual value of such parts of the testator's estates in the county of Suffolk, as were devised, and passed by the will, to the charity.

[720] An exception was taken by the defendant Whittington to the report; for that the Master had included in his schedule of the estates devised to the charity certain estates at Gamlingay and Crawdon, being leasehold estates held for long terms of years, over which the testator had not a disposing power at the time of making his will; which appeared by the examination of the said

defendant Whittington and the state of facts laid before the Master by the relators and certain deeds produced before him.

An exception was also taken by Sir George Bowyer; for that the Master had included several estates in the county of Suffolk; which did not pass by the will of the testator; which appears by the examination and proceedings produced before the Master and by the report itself; whereas the Master ought to have distinguished the estates, which were devised by the will, and not included or in any manner intermixed the same with estates, that did not pass by the will.

Whittington's exception was over-ruled upon the 2nd of November, 1796, without prejudice to any of the parties bringing before the Court hereafter the question, to whom the estates in Gamlingay and Crawdon belong. The other exception was also over-ruled.

The Master by his general report, dated the 11th of July, 1797, stated, that he found by the answer of Lady Downing, that, as the tenants required a number of new barns, &c. Sir Jacob Garrard Downing caused divers barns and out-houses to be erected: but with a view to transmit to his personal representatives the right to them he caused them to be erected on pattens or rollers, and not upon foundations fixed in the ground; Lady Downing therefore claimed liberty to remove them and to have a value set upon them for her benefit. The report stated, that such buildings were not fixed to the freehold.

As to the unredeemed mortgages the Master found one mortgagee in fee made to Sir George Downing, the father of the testator, by lease and release, dated the 30th and 31st of August, 1694: a mortgage for ninety-nine years made in 1688; assigned to Sir George Downing upon a farther advancement in 1709: another mortgage for 800 years made in 1670, and another for 900 years made in 1697: both of which were assigned to Sir George Downing *in 1709. The Master found, that Lady Downing by her answer stated, that she did not know, whether Sir George Downing was at the time of making his will in possession of the said mortgaged premises, or when he obtained possession; and she did not know or believe, that the equity of redemption was released to Sir George Downing, the father, or to his son, Sir George Downing, the testator. The Master certified, that no [*721]

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evidence had been produced to shew, that the equity of redemption in any of the mortgages was ever released to either of them; and that he had taxed the costs, except those of the devisees of Lady Downing. The mortgages were for very inconsiderable sums.

By an order made on the 28th of July, 1797, the Master was ordered to tax the costs of the heirs at law of the several applications to the Crown for a charter and of contracting for a piece of ground in the University of Cambridge, as between attorney and client. Five applications to the Crown for a charter had failed. The decree was enrolled in 1771.

The cause came on for further directions:

Mr. Mansfield, *Mr. Lloyd*, *Mr. Graham*, *Mr. Fonblanque*, and *Mr. Romilly*, for the relators, pressed for an account of the rents and profits against the defendants, and for the appointment of a receiver; observing, that every possible delay had been opposed to the execution of the trusts of this will; particularly by the exceptions, by a groundless appeal to the Court of Delegates, and by a bill of review for error upon the face of the decree; to which bill a demurrer was allowed.

The other directions prayed were, that the defendants might lay a proposal before the Master for founding a College according to the will; and a declaration as to the mortgages, that they passed by the will; and as to the subsequent costs.

Mr. Piggott, *Mr. Grant*, *Mr. Campbell*, and *Mr. Richards*, for the defendants:

The decree was never understood to touch the intermediate rents and profits. Lord THURLOW in a cause upon the distribution of Lady Downing's assets made the distribution; being of opinion, that there was nothing in the decree in this cause, that affected her assets. They ought to have followed up the decree, and the application to the Crown. No duty was imposed by the
[*722] *Court on the owners of this estate. The decree is conditional; that the trust shall be performed, in case his Majesty shall grant a charter and a licence to hold in mortmain. It is a condition precedent. The foundation of the College was not the province

of this Court; which had only to decide the other question. The decree carefully leaves that to the Crown. The LORD CHANCELLOR could do no more than decide the question, whether the charity could take place according to law, if the Crown should think fit to grant a charter. The Court carefully excludes even the prejudice and influence, that would arise from going beyond their jurisdiction to give an opinion upon the policy of increasing the number of colleges in the University. The Court has distinctly said, that none of these rents and profits can be applied, until the corporation exists: which according to the decision may take as by executory devise, when it exists. The decree negatives any claim to the rents and profits or any right to have them applied, and to dispossess the heirs at law, before the Crown gives existence to the corporation. If the charter is never obtained, their title will be complete. The words "as soon as may be" refer to the nature of the subject. Those words mean, as soon as there is some person natural or politic, which can take; as soon as the charter and licence are obtained, and the corporation is created. The will has no general intention of charity. There is both locality and a name given by the testator; and the expression is "such college." There is no difference between a natural and a corporeal person taking an executory devise. *Hopkins* v. *Hopkins*, For. 44, and *Bullock* v. *Stones*, 2 Ves. Sen. 521, are authorities, that the rents and profits go to the heir at law, till the contingency happens: but if not, when the College is in existence, when the use is executed for them, then will be the time for them to assert their right to these by-gone rents and profits. The Information prayed a receiver and an account: neither was granted: though there had been five years possession. That is not an omission in the decree: but the silence of the Court negatives the right of the relators to the possession of the estate, and the acts of all the parties put the same construction upon it. The Court contemplated the possibility of its failing; and therefore did not intend to take anything from the heir, until the corporation was created. If the want of a substitute for the trustees was the obstacle, that prevented the account, that obstacle was removed at the time of the second decree in 1769; when the heirs at law were substituted. The *right then [*723]

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was the same as now. They might have moved for a receiver at any time. They have acquiesced under the decree refusing them a receiver and an account for thirty years. They therefore cannot allege the length of time. Great part of the fund has now been expended by those, who had reason to suppose it their own.

It is still open to argue, that the object of this devise is so particular, that if it cannot be established, it is impossible to apply the principle of *cy pres*. In that respect it resembles *The Attorney-General* v. *The Bishop of Oxford*, 1 Bro. C. C. 444, n.; and though that case ended by compromise, the principle was decided. The bishop refused to let them build the church. The MASTER OF THE ROLLS said, if they refused, he would give it to the next of kin. Then the bishop, thinking he might make some terms advantageous for the parish, required enough to build a small chapel and to maintain a chaplain, and agreed, that the next of kin should take the rest.

Reply:

According to the decree it is impossible, that in any event, the assets received by these defendants could belong to them. No doubt at the time of the decree it was considered, that the doctrine of *cy pres* would apply, whatever doubt has been thrown upon that doctrine since. How could it be imagined, that if by accident on one side or by artifice on the other the charter could be delayed, the trustees should get the rents and profits, not only from that particular charity, but from that object, to which by the law of this Court the fund would be applied. The decree establishes the will and all the trusts. It establishes the trust of the charity. That is said to be established conditionally; but it could not be otherwise. The trusts of the will could not be carried into execution according to the intent, unless the charter was obtained. An immediate application of the rents and profits could not be directed, while it was possible, the College never might exist; especially as it was the opinion of the Court, that if this charity could not take effect, the disposition should take effect for some other purpose. There was no conception of any difficulty in obtaining a charter. Lord Chief Justice WILMOT thought it might be procured in six months. By the decree the

heir was immediately at liberty to contract for a piece of ground conditionally. *From the death of the testator the whole fund was devoted to the charitable purpose. It is not an executory devise, but an immediate devise. There is not the least similitude between this case and *Hopkins* v. *Hopkins*. The defence amounts to this: that they may keep the rents and profits as long as they can throw difficulties in the way of the creation of that political person. That was the object of Sir George Bowyer's exception to the report upon the ground, that the estates were not distinguished; though he having the title-deeds was the only person who could give the Master information upon it. So the appeal to the Court of Delegates could have no other object than delay. With the same view they filed a bill of review for error on the face of the decree; to which bill a demurrer was put in, and allowed. The words "as soon as may be" do not refer to the time necessary for obtaining the charter; as is suggested. If it was clear, that the rents would belong to the heir, until the charter was obtained, why did not the heir desire such a declaration? That would have been immediately refused. This is the naked case of an account against a trustee of rents and profits, to which he had no right.

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LORD CHANCELLOR:

This is an application to me upon several different grounds on different branches of the case. The cause is set down for farther directions upon the report of the Master. The directions prayed are for liberty or an express direction and authority to the trustees, the heirs at law, the persons delegated by the Court to be active in the trust, to lay a proposal before the Master for a plan of a college. But little objection was taken to that in the argument; and it is very much of course in such a case; the Court having declared the will well proved; and that the trusts ought to be performed and carried into execution. The necessary consequence of such a decree is, that, when it is settled, as it came to be in this cause, who are to be active, it being a matter of doubt at the time, but the decree having fixed the heirs at law with it, that is, the heirs as they come into possession, the Master might, I think, have received a proposal without a direction; but I believe, in the Master's office the course is not to act

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without a specific direction. Therefore I have no difficulty in giving that direction.

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The matter of farther directions also respects another part of the case: viz. the mortgages; which, except one, which is in *fee, are, according to such evidence as can now be found, long terms for years only; and it is stated by the answer of Lady Downing, that she does not believe, there ever was any release of the equity of redemption. Considering the length of time, I have no difficulty in holding, that they constitute part of his estate; and pass by his will.

The material question is upon the petition for the appointment of a receiver, and the account of the rents and profits. Those two points are in some degree connected together, but not necessarily connected; for there may be many cases, in which a receiver may be appointed, where the Court has not formed any decision, who are entitled to the rents and profits; but for the security of the fund, to protect the rights of the parties, and in order to be able to make that future decision, when those, who may be finally entitled, may be ascertained. But I wish to consider the claim set up on the part of the representatives of Lady Downing, who was the representative of Sir George Downing, to the intermediate rents and profits from the time of the death of Sir George Downing to such period of time, when there shall be an establishment of a College incorporated, when a licence to hold in mortmain. That claim certainly is not founded in any express terms of the decree: at the same time there are no express words in the decree barring it. The point was not raised at the hearing. The Court has expressly pronounced no decree whatsoever upon it. Under these circumstances I must notwithstanding the length of time act, as if the decree had been a recent decree. The decree is to me a law. I cannot reason, whether it is proper or not. Whatever it might or ought to have been, it is to me imperative, final, and irreversible. All, I can do, is to apply the decree.

This leads me necessarily to consider, in what view the Court would have understood the claim; and whether, though it is not expressed in terms, the decree has not in effect disposed of that question. It is resembled to those cases, which are extremely

familiar, where there is a devise to take effect at a remote period upon a contingency, and there is no intermediate disposition of the rents and profits. This Court holds it a resulting trust for the heir. That is established by *Hopkins* v. *Hopkins*, followed by several other cases. Let us consider then, what would have been the argument with regard to this case, if this point had been stated and pressed upon the Court to obtain such a declaration on behalf of Lady Downing at the hearing. First, as to the legal right: it is perfectly established, that, though the object of the devise be to some future establishment of a use good in itself, the intermediate *rents and profits are not capable of being taken by [*723] the heir at law, standing in the place of his ancestor: but at law they are applicable to the use, if the use is a legal one. That is distinctly proved by *Porter's* case and the case of *Sutton's Hospital*, 1 Co. 16; 10 Co. 1. Therefore it is material to state, upon what ground they stand, and how far they affect it as at law. *Porter's* case was upon a devise before the Statute of Wills † and consequently before the Statute 43 Elizabeth.‡ It does not appear, that this Court at that period had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere, as far as the tradition in times immediately following goes, there were no such Informations as this, upon which I am now sitting: but they made out the case as well as they could by law. It was a devise of houses, devisable by custom, being in London, to the testator's wife for life; upon condition to establish a charity: which required a licence to alien in mortmain to the effect of substantiating the charity. Instead of performing the will she made a long lease; and the mode taken to effectuate the charity was this: they found the heir at law; and he having entered conveyed to the Queen; by which means she had it in her power to establish the charity. The clause was tried upon an ejectment brought by the heir upon the ground, that the wife by the lease had broken the condition. The defence was, that the condition was void; and therefore the estate of the wife absolute. The determination was, that the use was good;

† 32 Hen. VIII. c. 1; 34 Hen. VIII. c. 5. The will of Nicholas Gibson, the testator, in *Porter's* case, was dated the 24th of September, 32 Hen. VIII.

‡ C. 4.

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therefore the condition was good; and that the condition was broken; and therefore the heir had a right of entry; and the authorities referred to by Lord Coke, who argued it, are authorities from antecedent cases, in which this doctrine was established: that if a feoffment is made to a general, legal, use, not a superstitious, not a bad, use, but a legal, moral, and proper, use, though indefinite, though no person is *in esse*, who could be the *cestui que use*, yet the feoffment is good: and if it was bad, the [*727] heir * of the feoffor would have been entitled to enter; the legal estate remaining in him. Several instances were quoted of a general, indefinite, purpose: one from Bendloe: a feoffment to the use of the poor indefinitely. No use could be more general, or could less produce a certain person, to whose use it could be said to enure: but the common law held, that the use being good, the estate well passed; and there was no right in the heir of the feoffor. Therefore in the particular case, though no licence to aliene in mortmain was obtained, though the purpose could not be accomplished without that, the argument failed: the condition was a good condition; and the right of the wife, whose representative claimed, was held to be no right.

The same point in effect was determined in the case of *Sutton's Hospital;* for Sutton had made the conveyance by bargain and sale without having obtained a previous licence and a previous incorporation. The bargain and sale were antecedent. Therefore the argument was, that the heir at law of the bargainor was entitled to enter. He brought an ejectment; and if the argument was well founded, that, because there was no estate, to which the bargain and sale could relate, it operated nothing, and was for an indefinite and general purpose, his entry was good. All the same species of objection have been urged here, as were the foundation of the argument in that case. It was held, that it was not void; but was a good conveyance of the land. Though the corporation was not in existence, the purpose being good, the heir of the bargainor had no interest in the land.

Then how does this case stand, if those were good uses, and bargains and sales or feoffments to such uses would have taken the estate completely out of him, and so have barred the heir? An appointment by will, if the purpose described by the will is

good, is a good use at Common Law. If the trust is to be executed in this Court, this Court by the power, it has, and the jurisdiction over trusts, ought to prevent the heir at law from claiming any right. Upon looking at the decree the trust by the decree here is as emphatical a trust of the rents and profits as of the land, for the purpose, as soon as may be, of purchasing the ground and building upon it; and part of the trust, which the Court has declared good, is to obtain a charter and licence. The case would have been exactly the same, supposing, the devise had been to an existing college, but which had exhausted its licence to hold *in mortmain; for until that licence had been extended on [*728] the part of the Crown, the College having no power to hold in mortmain could not have taken any legal interest in the land. It can hardly be imagined, that the rents and profits accruing between the death of the testator and the time, the right to hold in mortmain was *de facto* granted by the Crown, would go to the heir. I do not wonder, that no direction for an account or the appointment of a receiver was given at the time. Perhaps it occurred, that the parties might proceed more quickly without the appointment of a receiver. Taking with the knowledge of the trusts they would have been bound to apply the rents and profits. There was no imminent reason, that pressed for that direction at the time of the decree: but under the circumstances, if within a small period afterwards it had been suggested to the Court as necessary and proper, I have no conception, that an application to the Court to appoint a receiver, to have the rents and profits made applicable, and to furnish those, who were to execute the trust, with the means of executing it, would have been refused. Considering the great authority, by whom that decree was made, it would be a singular indecency to suppose, that a defect was left in the decree on purpose to defeat what the Court thought themselves bound to establish in pronouncing the decree. Lord CAMDEN in the judgment he gave, stated, that *ex debito justitiæ* he was obliged to act; that the Court could not be passive. No reluctance was shewn in making the decree: but it was as decisive and frank an opinion as could be given. As to what was thrown out, that there are colleges enough in Cambridge, the Court says the contrary. The Court has said, there is nothing

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in this devise, that should prevent the execution of the particular purpose, if it was consistent with the pleasure of the King, that it should take effect; or if not, to defeat the general charitable

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purpose, that according *to the judgment pronounced, consistent with all the strong authorities that were referred to, authorities down to the time of Lord NORTHINGTON, who affirmed a decree of Sir THOMAS CLARKE, the Court is called upon to execute. I should take a very dangerous and a very improper latitude of opinion, if I let the ideas, that met with some degree of encouragement, not established by any precise decree of the Court, but rather applauded than established by any decision, that I am acquainted with, prevail against that opinion. The decree declares, that the trusts of the will ought to be performed and carried into execution: then the specific trust for the creation of the College is suspended, until the Crown thinks fit to grant the charter: but the language of the decree, and, if it wanted a comment, the judgment of every one of the judges, shews, it is a good devise to charity. According to the will, the arguments of all the judges, and the number of cases referred to, the right of the heir is totally gone. The decree has not said, that, the particular trust failing, the will is void. The King may appoint it to another purpose.

It will be necessary to give many particular directions as to the appointment of a receiver, also as to directing the account; for though in positive right I am bound to say, these rents and profits do not belong to the persons, who have been in possession of them, and I am bound to call for the rents and profits, to take care of them, and in the case of a charity I cannot act upon the ground, that any person has been guilty of laches, nor give the advantage to the defendants, that in other cases I should be urged to do, as the benefit from the length of time, &c. and though it has happened in many cases, that the Court has been obliged to follow the assets at great inconvenience and great hardship to the parties, as upon that singular will of Mr. Travers, when I was obliged to make a very harsh decree upon those, who held the assets for a long time, yet I wish, I could satisfy myself, that there was any shorter and more limited period, from which to date the account. I have found extreme difficulty in making it

any thing less than the strict right calls upon me to do.† Therefore I wish to *suspend that part of the decree; and without pronouncing the particular directions I will consider, what order I can frame for the appointment of a receiver, in which the directions must be special, and also for the account of the rents and profits.

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Declare, that the trustees shall be at liberty to lay a plan before the Master for founding and establishing a College according to the directions of the will. Let the Master consider of such plan; and report upon it. Let all parties have subsequent costs. Declare upon the mortgages, that they passed by the will.

WILLIAMS *v.* LORD LONSDALE.‡

(3 Vesey, 752—757.)

1798.
Feb. 22, 23.
May 8, 11.

LOUGHBOROUGH, L.C.

[752]

Devise of a copyhold (duly surrendered) to A., and his heirs in trust for B., and his heirs: upon the death of B. without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs.

Whether mandamus to the lord to admit to a copyhold lies. *Qu.*

ISAAC HONNOR, being seised in fee according to the custom of the manor of Laleham Billets of thirty acres of customary lands, by his will (having first duly surrendered the premises to the use thereof) devised all the said thirty acres of customary land to his wife Mary in fee: and soon afterwards died; upon which his widow was in 1752 at a Court-baron of the said manor admitted tenant to the said thirty acres; and at the same Court she surrendered them to the use of her will. She afterwards married Sampsen Bennet; who died in her life intestate and without issue.

Mary Bennet by her will devised to Jane Noble and Walter Williams all and every her freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, to hold to them, their heirs, executors, and administrators, respectively, according to the nature of the several estates, during the natural life of Catherine Browne (sister of the testatrix) upon the trusts

† The LORD CHANCELLOR during the argument intimated, that the account ought to be with interest and costs.

‡ *Gallard* v. *Hawkins* (1884) 27 Ch. D. 298, 306, 53 L. J. Ch. 834. See now Intestates Estates Act, 1884, s. 4.—O. A. S.

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[*753]

nevertheless and to and for the several intents and purposes after limited, expressed, and declared: that is to say, upon trust out of the rents, *issues and profits, to pay an annuity of 50*l.* into the proper hands of her said sister Catherine Browne during her natural life; and as to the residue of the rents, &c. after discharging the expense of repairs, and satisfying the said trustees for their trouble in receiving the same, to pay or otherwise permit said Jane Noble to receive the same for and during the term of her natural life for her separate use; and after the decease of her sister and Jane Noble she devised all the said freehold, copyhold, and leasehold, messuages, lands, &c. to the said Walter Williams, his heirs, executors, and administrators, respectively, according to the nature of the several estates, upon trust for the heirs and assigns of the said Jane Noble for ever; charged with an annuity of 10*l.* for three years; and she appointed Jane Noble and Walter Williams executors.

In 1779 the testratrix died. The executors proved the will; and Walter Williams entered upon the real estates, and received the rents and profits, and applied them according to the directions of the will till 1781; when Jane Noble having married Henry Malpass, Williams permitted them to receive the rents, and apply them according to the will.

Jane Malpass died in 1782 without issue or any heir whatever. Walter Williams died in May, 1783; having never been admitted to the said copyhold estate. Catherine Browne died in June 1783 without any heir; having been paid her annuity to the time of her death.

The bill was filed by the only son and heir at law of the trustee Walter Williams against the lord of the manor of Laleham Billets; praying, that the defendant may be compelled to admit him to the said copyhold estate.

The lord claimed by escheat; the trusts of the will being performed and at an end.

Attorney-General, *Mr. Mansfield*, and *Mr. King*, for the plaintiff:

The defect of a tenant is the only ground, upon which the lord can claim. Here is no defect of a legal tenant. It has

been long established, that this is the proper Court to compel the lord to admit.

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LORD CHANCELLOR:

This is the case of *Burgess* v. *Wheate* exactly. [754]

Solicitor-General and *Mr. Graham* for the defendant:

The plaintiff comes into equity, insisting upon a legal right, and having no equitable right whatever. He is intended to be a mere trustee, to take no beneficial interest. If Mrs. Noble had died in the life of the testatrix, he would have had no claim but for the heirs of the testatrix; who would have been entitled by descent, not under the will. The plaintiff comes in quite a different character and for a different purpose from those of the plaintiff in *Burgess* v. *Wheate*, 1 Black. 123. There the grantee of the Crown was obliged to come into Equity upon an equitable title against the person having the legal estate, for the purpose of compelling a conveyance; and the decision was upon the ground, that there was no equity on behalf of the Crown to compel the heir of the trustee to make that conveyance; for the Crown could only claim the equity vested in the person, to whom the estate was given; and that equity ceased in consequence of the death of that person without an heir: and therefore it was impossible to sustain that claim. This case is directly the reverse of that. The only title of the plaintiff is as trustee for a non-entity. There is no ground for equity to interfere. Equity never interferes upon a copyhold estate but to compel the lord to do justice, where the conscience of the lord is bound in favour of a person claiming properly under the lord. In *The King* v. *The Lord of the Manor of Hendon*, 2 Term Rep. B. R. 484, the Court of King's Bench did certainly grant a mandamus to the lord to admit; and they held the same doctrine in *The King* v. *Rennet*, 2 Term Rep. B. R. 198: but it was not submitted to.

LORD CHANCELLOR:

That case has not been followed, I think.*

* Since this case the Court of King's Bench has maintained that jurisdiction: *The King* v. *Coggan*, 6 East, 431; and *The King* v. *The Duke of Leeds*, in the note, 432.

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For the Defendant:

The King v. *Midhurst*, 1 Wils. 283, which is relied upon in 2 Term Rep. B. R. 198, proves, it ought not to be granted; and it was refused in another case: the Court doubting, whether, as it involved a private right, they could grant a mandamus. The question here is simply, whether the plaintiff has a title in conscience against the lord. In *Burgess* v. *Wheate*, *Lord MANSFIELD was in favour of the equity for the Crown: Lord HENLEY was of a different opinion; principally upon the ground, that the title of the Crown must be in right of a person not existing; viz. the heir of a person who died without an heir. So this plaintiff can only claim in behalf of a person who does not exist. A copyholder's is really an equitable title. It is to be completed by admission; which can only be compelled in a Court of Equity; and until actual admission the Courts of Law will not take notice of it. This is not the case of the heir, but of a person claiming a right to be admitted upon a surrender to the use of a will.

[*755]

LORD CHANCELLOR:

I had taken this up a little too quickly. I conceived it to be the case of *Burgess* v. *Wheate*. So it very nearly is: but upon looking into that case it rather applies for the defendant; for the ground of the decision, particularly in Lord NORTHINGTON'S opinion is, that the Court had no jurisdiction. Then *ex converso* I want to know, what jurisdiction I have. They might have demurred to the bill.

For the Plaintiff:

The right of a copyholder is not an equitable, but a legal, right; for the admission is mere form: but though it is a legal right, yet the Courts of Law have now said, there is no remedy at law; for the late cases of the mandamus which were founded upon a mistake of a case in Comberbach, cannot be supported; and the Courts have said, that, though it is a legal right, the copyholder may come into Equity. If a fine was due, the lord might call upon him to be admitted. To complete his right against the lord and to preserve evidence of his title it is

necessary for him to procure an admission. For those reasons he must come here, though having a legal title; the Courts of Law refusing their assistance. It is a single case. To say, this plaintiff has no right to procure admittance from the lord, is to say, no copyholder has such right. He is in the same situation as the heir of any other copyholder, if *Burgess* v. *Wheate* is law; for the trust is nothing to the purpose. The defendant is only to look, who was the last legal tenant; and whether he disposed of his estate or suffered it to descend to his heir. It is immaterial to the lord, what uses are behind. It is true, he comes upon a legal title: but there is a form necessary to complete and give evidence of his title; which can be obtained here only. In Comyn's *Digest and Equity Cases Abridged, [*756] tit. Copyholder, there are many cases establishing the jurisdiction of this Court to compel the lord to admit. The defendant received the surrender from the owner; and must therefore admit the person directed by it.

LORD CHANCELLOR:

The lord could not help receiving the surrender.

The only point determined in *Burgess* v. *Wheate* was, that the Crown, entitled as it was supposed, by escheat upon the death of the *cestui que trust*, had not a title by *subpœna* in this Court to make the heir of the trustee, having merely a legal estate, convey; but there was no equity for this Court to exercise jurisdiction. Is not the converse of that equally true? If the lord has no equity in that case, can I find any ground of equity, where the person having the legal estate, and telling me, he has no beneficial interest, desires me to act for his benefit upon the estate of the lord? The Court considers the mere legal estate as nothing. It is clearly true, that if the lord refuses to admit the tenant, this Court will compel the lord to admit him: the title standing upon the rolls of the manor. The ground for this Court acting between lord and tenant is, that the lord *de jure* may call upon the tenant to be admitted, if he stands out; for he has a right to the fine and his services: the tenant having all the beneficial interest not the lord. This Court will not let the parties stand in this situation, that the lord, who has his remedy

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against the tenant to compel him to pay the fine and perform the services, or to forfeit his estate, shall by refusing to call upon him prevent him from having evidence of his title upon the rolls, which are in the lord's keeping. The Court acts in that case upon the ground of the tenant's having the beneficial interest in the land. I wish it to stand over; for in my present view of it I wish first to be informed, what my jurisdiction is. Both in cases of purchase and surrender to the use of the will the lord does by permitting the surrender to be entered upon the rolls partake of the trust: but that does not go the whole length of the point, I wish to be considered. I feel considerable doubt and that doubt is grounded upon the reasoning, which supports *Burgess* v. *Wheate*.

May 8.

The cause came on again; and the counsel for the plaintiff repeated their arguments in support of the bill: but no new ground was suggested.

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LORD CHANCELLOR:

How do you give me jurisdiction? Have you found any case, where a person having the legal estate, and only the legal estate, can come into this Court for any purpose? The result of *Burgess* v. *Wheate* is, that the grantee of the Crown had no right to a *subpœna*. I wish to know, if there is any instance of a bill sustained upon a mere legal title for an accessory to the legal estate. Here upon the state of the case you are only entitled to a legal estate, without having any very beneficial interest in the land; and you come to desire me to support the legal title compelling the lord to admit you. If it is a legal duty, I do not know, what I have to do with it. *Burgess* v. *Wheate*, supposing it well decided, establishes, that if a man has got the legal estate, the Court will not take it from him, except for some person, who claims, by descent, devise, or purchase, some interest in the land: but it does not follow, that I am to give him the legal estate. In the case of Sir Francis Cust he had the legal estate under a will: but there was an outstanding term, which prevented him from coming to the actual possession. The purposes of it were satisfied; and he wanted to get it annexed to

the legal estate. It came upon motion before Lord Northington. The bill, which was singular in its form, was a good deal scouted.

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May 11.

The cause stood over till this day; when the

Bill was dismissed without costs.

BYRN *v.* GODFREY.†

1798.

(4 Vesey, 5—11.)

June 22

[5]

Notwithstanding declarations of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets; which were insufficient for the legacies; a charge on the real estate failing for want of a proper attestation of the will.

Undertaking to do something if the will is not changed, is binding.

JOHN CREE, being possessed of a considerable estate, by his will, dated the 20th of October, 1795, but which was not executed as is by law required to pass real estates, directed, that all his estates real and personal should be converted into *money, and [*6]
be placed out upon landed security; and that the issues and profits thereof should be disposed of, &c.; and amongst other bequests the testator gave to John Byrn the sum of 100*l.* per annum for his life in half yearly payments at Christmas and Midsummer, with remainder to his daughter Caroline Byrn for her life after John Byrn's decease.

The testator died in November, 1795. Upon the bill of David Godfrey and James Archdekin, the acting executors of the testator, a decree was made in Michaelmas Term, 1796, directing the usual accounts. In May, 1797, John Byrn on behalf of himself and his infant daughter filed this bill against the executors; praying an account of what was due to the plaintiff John Byrn in respect of the annuity bequeathed to him, and that the defendants may be decreed to pay what shall appear to be due; and that the future payments may be secured; that an account may be taken of the personal estate of the testator; and that the defendants may be decreed to deliver up to the plaintiff John Byrn the promissory note, mentioned in the bill, to be cancelled, and be restrained from commencing any action upon the same.

† *Re Applebee* (1891) 3 Ch. 422.

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The promissory note, as to which the relief was sought, was given by the plaintiff to the testator, dated the 8th of November, 1793, for 200*l.*; which the testator had lent to the plaintiff; and the bill charged, that the testator in his lifetime acquitted and discharged the plaintiff from the payment of the said note; and [*7] never received or demanded any interest on it; never *demanded or intended to receive the principal; and a few months before his death, he told the plaintiff, who then offered to pay the note, that he should never call either for the principal or interest due on it; and that it should be considered as satisfied; and that he could not then give it up, because it was in London at his bankers.

The bill also charged, that the testator the day before his death prepared instructions for his will at the house of the defendant Archdekin; and then stated to the said defendant an account of his property; and in making memorandums of the amount he mentioned the said note; and informed the said defendant, that the said note was not to be accounted part of his property; as he never meant to demand it; and that the said debt should never appear against the plaintiff; or to that effect; and the testator frequently upon other occasions declared in the hearing of the said defendants, who were also executors of his former will, and of divers other persons, that he never meant to demand payment of the said note; and that the same should never be enforced against the plaintiff, or to that effect.

The plaintiff however having no evidence in support of these charges, the cause was heard on bill and answer.

The defendants by their answer stated, that they knew nothing of the conversation between the plaintiff and the testator, as stated by the bill; and that they believed, the assets of the testator would be by no means sufficient for the payment of the legacies and annuities given by the will. The defendant Godfrey stated, that he never had any conversation with the testator, nor ever heard him make any declaration concerning the said debt so due from the plaintiff.

The defendant Archdekin admitted, that the testator frequently declared to the defendant, and in his presence and hearing, that he never meant to call upon the plaintiff for the 200*l.* he had lent him on his note; and the defendant stated, that he particularly

remembered, that on the day before the death of the testator, while he was writing down instructions for a new will at the house of the defendant, that the said John Byrn was his particular friend; and as he had a large family, he the said testator would not on any account distress him by calling on him for the money, he had lent him; or to that effect.

By a farther answer the defendant Archdekin stated, that the testator was on the day preceding his death at the defendant's house; and on being questioned by the defendant what he was so attentively committing to paper the testator answered, that he was making out a statement of the amount of his fortune, as a preparatory step towards enabling him to give proper directions to Mr. Claridge for a new will; as he had altered his former testament; of which this defendant had been also appointed one of the executors; that at such time, as aforesaid, and on several previous occasions the testator declared, that he never meant to call on the plaintiff for the sum of 200*l.*, which he owed him on his note of hand; as a very long and most intimate friendship had subsisted between the plaintiff and the testator; and moreover as the plaintiff had a large family, and was in circumstances proportionably narrow: but the defendant does not remember or believe, that the testator did ever inform him, that the said note was not to be accounted part of his property; or that he intended to cancel it; or that the said debt should never appear against the plaintiff: yet the defendant from what he had heard the testator say, as well on the day preceding his death as on other days, (the particulars of which the defendant has hereinbefore set forth,) inferred, that the testator did not at the time of such conversations mean, that the said note should be considered as any part of his property. [8]

Mr. Mansfield and *Mr. Romilly*, for the plaintiff:

Wekett v. *Raby*, 3 Bro. P. C. 16, is a stronger case than this. The defendant admits language in the strongest terms expressing the sense of the testator, that the plaintiff should not be called upon for payment of the note; as a very long and intimate friendship had subsisted between them: and the plaintiff had a large family, and was in narrow circumstances. The defendant

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Archdekin also admits, that he understood, the testator did not mean, that this note should be considered as any part of his property. *Richards* v. *Syms*, 2 Eq. Ca. Ab. 618; Barnard. C. C. 90, and also reported in 2 Atk. 319 upon a motion for a new trial, is a direct authority. That was a release without consideration; which probably will be the ground of opposition in this instance. Lord HARDWICKE there relies upon the circumstance, that the mortgagee said, the mortgagor might keep the deeds; which he considered as equivalent to delivering them up.

[9] LORD CHANCELLOR:

The case of *Aston* v. *Pye* * before Lord Kenyon at the Rolls upon Sir Thomas Pye's will was exactly like this. Sir Thomas Pye had made an entry in his book, that he had taken a note; that he never intended, it should be made use of against the debtor, unless he himself should want it. In that situation he died, having disposed of his personal property. Lord KENYON sent it to the Court of Common Pleas to see, whether we could make a release of it. That failed. An idea was thrown out, that they might prove it in the Ecclesiastical Court. I believe, that also failed. The difficulty is, what you can make of it unless you can make it a release. I do not see, how I can consider it as otherwise than as part of his assets.

Attorney-General and *Mr. Leach*, for the defendant:

In the case in Bro. P. C. the reasoning goes upon this; that it would be a fraud in the residuary legatee to disappoint the intention of the testator. From the express direction to the residuary legatee, her promise, and the acknowledgment of it, it was a breach of trust to put the bond in suit; and the Court interfered on that ground. This executor is not standing for himself. He takes nothing under the will. In the other case cited the mortgagor had some way or other got back possession of the deeds; and he went to return them to the mortgagee: who then desired him to keep them; which Lord HARDWICKE thought equal to delivery of the deeds: but the jury did not think

* See that case stated in *Eden* v. *Smith*, 5 R. R., to be shortly published.

the account of the transaction founded. It is very dangerous to admit evidence of these conversations. This must be considered as a release, if any thing. There is not the least colour for it as *donatio mortis causâ*. According to *Heathcote* v. *Crookshanks*, 2 Term Rep. B. R. 24, a creditor may recover the debt even against his own promise; and therefore his executor may.

Reply:

There can be no distinction between declarations of the testator to a residuary legatee and to an executor. A creditor surely may forgive a simple contract debt. This amounts to a release. In *Aston* v. *Pye* it was not an absolute release, but in case he should not himself want it. Lord KENYON thought, evidence ought to have been given, that he was in circumstances not to want it. In this case there is a positive declaration of the testator, that he did not mean, the debt should be called in.

LORD CHANCELLOR:

This case goes a great deal farther than either of the cases quoted. In the case before Lord MACCLESFIELD the ground *upon which he determined, was very strong; for according to [*10] the admission in the answer the testator, at the time he was giving directions, parol directions, about his funeral, held a conversation with his residuary legatee; telling her, Raby had been a particular friend to him, and would be to her; that he had kept the bond, because he might want it himself as much as Raby; but that he did not intend, Raby should pay it. There were other circumstances. Immediately after the death of the testator, when upon examining his papers the bond was found, Raby desired, it should be given up to him. The residuary legatee said, it should not be put in suit. He objected, that it might not always be in her own power; and suggested, that she might marry; and she promised, that in case of her marriage she would give it up the night before her marriage. She did not admit all this: but she admitted the conversation with the testator; and only qualified it thus; that he did not order her to deliver up the bond: but she admitted the declaration of his intention. She did not deny the con-

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versation after the death of the testator; but gave this turn to it; that Raby asked her to give up the bond as a favour; and she stated it as an option in her. From all this the Court had a fair ground to conclude, the case stood exactly according to the representation of the plaintiff; and being so, the testator talking to a residuary legatee, and that being admitted, so as that the Court has sufficient evidence, the residuary legatee will not be permitted to benefit herself of that, which was not given to her. It is very near an undertaking by her to do something, if the will is not changed. Therefore the silence is assent on the part of the residuary legatee, and an engagement, which in point of conscience ought not to be broken by her.

The case before Lord HARDWICKE is very strong; and I take it, he considered it equivalent to a delivery of the mortgage-deed with an intention, that it should never be used. The deeds coming into the possession of the mortgagor, he represents himself as having very honestly offered to deliver them to the mortgagee; who said, "No: keep them: I do not intend to demand the debt." It is very near a delivery of *the deed; and if that had been the fact, there is no doubt, the representatives would not be entitled to call it back to put it in suit.

[*11]

I am afraid of this case; for it really amounts to this: it is setting up the parol declarations of the testator to defeat the will. If it was the case of a residuary legatee, there would be much less difficulty: but here is a will giving particular legacies; and this 200*l.* is wanted as assets. According to the account of the defendant Archdekin, which is, I dare say, a very fair one, at the time, the testator was about to make a will according to the state of his property, which unfortunately he did not execute, he had it in his intention. It is not an actual release at any one given time; so that I can state, that the debt was gone by the act of the person, to whom it was due; nor is it a legacy. If instead of making a new will, they had only attested the existing will, there would have been no deficiency. I wish, I could have decided the other way; for it is clear what the intention was: but the great danger of the case makes it impossible.

Dismiss so much of the bill, as prays, that the note may be

delivered up, without costs: as to the residue of the prayer, proceed under the decree in the former cause.

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The order of the House of Lords as to the costs in that case before Lord Macclesfield is very singular. It is the only order of the kind, I ever saw. If the principle of Lord MACCLESFIELD's decree is fully adopted, no doubt, his direction as to the costs is perfectly right.

WHITE *v.* WHITE.

(4 Vesey, 24—36; on Appeal, 9 Vesey, 554—562.)

1798.
June 30.
July 12.

Rolls Court.
ARDEN, M.R.

1804.
June 9, 16.

ELDON, L.C.

[24]

Bill by devisee in remainder to him and his heirs male of a lease for lives against tenant for life, also entitled in reversion to him and his heirs, to compel him to procure a renewal, one life having dropped: the construction of the will being, that the lease should be kept full, and that 500*l*. and no more should be charged thereon for that purpose upon the dropping of each life, decreed, that if the plaintiff chose to pay the excess, the lease should be renewed, in trust to secure the 500*l*., and, subject thereto, for the defendant for life; after his decease to raise the farther sum advanced by the plaintiff for renewal and the expense of the suit, with compound interest at 4 per cent. during the life of defendant; and, subject thereto, for plaintiff in tail male; remainder to defendant and his heirs.

Affirmed on Appeal by Lord ELDON, L. C., who added an express direction that the tenant for life ought to have kept down the interest.

Tenant for life of an estate for lives being himself one of the lives, it is not competent to the remainder-man to compel him to contribute to the expense of renewal, if it is a legal estate: *Qu.* if a trust.

The rule, that tenant for life of an estate for lives shall pay one-third of the expense of renewal, was unreasonable, and does not now prevail: the fair proportion is, that he shall keep down the interest, like the devisee of a mortgaged estate.

CHARLES WHITE being seised of an estate in the parish of Wilsdon under a lease granted by the prebendary of Mapesbury to him, his heirs and assigns, for the lives of himself, Samuel Grubb and John Ward, and the life of the survivor, by his will, dated the 1st of December, 1752, and duly executed to pass real estates, gave to Henry Hyatt all his messuages, lands, tenements, and hereditaments, whatsoever, in the said parish for his life; after his decease, to his (the testator's) brother William White for life; after his decease to William the son of the said William White; with successive estates for life to Samuel,

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Charles, and John, the 2nd, 3rd, and *4th sons, of William White the elder, and to the testator's brother Dr. Thomas White; and afterwards to Charles White, son of the said Thomas White, and to his heirs male; and for want of such issue, to the testator's right heirs for ever. He directed, that his house and garden called Mapes (being part of the said premises) should be kept in good repair; and, if said Henry Hyatt should think fit, that his goods and household furniture should be preserved and enjoyed with the house; and he ordered, that the church lease of his estate should be renewed, and the fine paid out of his personal estate, as soon as possible after his decease in the name and for the life of Mr. Hyatt, or any other life, he should think fit; and that in case any life or lives, that should be nominated in such lease, or any subsequent lease or leases, to be granted or renewed during the life of Mr. Hyatt, or during the life or lives of the testator's brothers William and Thomas or their sons after Mr. Hyatt's decease, should happen to die, then and in such case in order to keep the lease full during their respective lives and to enable them to pay the fine and fines of such renewals the testator thereby gave and granted, willed and transferred, unto Mr. Hyatt during his life and to the testator's brothers William and Thomas and their sons during their respective lives as they should come into actual possession of the estate full power and authority from time to time, as occasion should require to renew the lease, to mortgage the same and the estate thereby devised or any part thereof for any number of years to any person or persons for any sum not exceeding 500*l.* for renewing the said lease as aforesaid; and he gave to Mr. Hyatt and to his said brothers William and Thomas and their sons, as they should come into possession of the estate full power and authority to grant any lease or leases of his estate or any part thereof to any person or persons for any number of years not exceeding twenty-one, so as such lease or leases should be made at the best rent, that could be got without any fine or income and to be made payable after his, her, or their, death to such person or persons as should be entitled to the reversion or inheritance thereof.

The testator died in July, 1754. Upon his death Hyatt entered; and in October, 1754, he surrendered the lease; and

took a new lease to him, his heirs and assigns, for the lives of himself and the two remaining *cestuis que vie*, who survived the testator; praying for such renewal out of the testator's personal estate a fine of 250*l*.

[26]

William White, the testator's brother, died in 1762. John Ward one of the *cestuis que vie*, died in the life of Hyatt: but nothing was done upon his death. In 1774 Hyatt died; at which time Grubb, the only surviving *cestui que vie* was of the age of eighty-four. Upon the death of Hyatt the testator's nephew William White entered; and in November, 1774, without any communication with the remainder-men he surrendered the lease; and took a new lease to him, his heirs and assigns, for the lives of himself and of Samuel and John White, his brothers, and of the survivor of them. William White paid 500*l*. as a fine upon this renewal; and, having borrowed that sum from Thomas Hodgson, he in 1775 in pursuance of the power contained in the will mortgaged the said leasehold estate to Hodgson for that sum.

Charles White died in 1776. Samuel White died in November, 1783. In April, 1786 William White without communication with the remainder-men surrendered the lease; and took a new lease to him, his heirs and assigns, for the lives of himself, his brother John White, and Richard Hopkins, and of the survivor of them. Upon this renewal he paid a fine of 1,170*l*. no part of which was raised under the power contained in the will. By deed-poll indorsed upon the renewed lease William White executed a new mortgage of the said leasehold estate to Hodgson for ninety-nine years, if the three *cestuis que vie* or either of them should so long live, for securing the 500*l*. borrowed upon the former renewal.

John White died in 1794; and the testator's brother Dr. Thomas White died several years ago. The bill was filed by his son Charles White against William White, the tenant in possession; who was also entitled, as heir at law of the testator, to the reversion, subject to the remainder to the plaintiff and his heirs male, and against Hodgson, the mortgagee, and the Bishop of Gloucester, Prebendary of Mapesbury; praying, that the defendant White may be decreed to procure another new lease for the lives of himself and two other proper persons; and that

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Hodgson may do any necessary act to procure such renewal, and that the defendant White may pay the necessary fine; and in case both the persons to be named with the said defendant shall die in his life, that he may from time to time procure additional lives or an additional life to be added, in order that there may be always during the life of the said defendant three lives in the lease: the plaintiff, *in case it shall appear, that he ought to pay any part of the said fine or fines to be paid for such renewal or renewals, offering to pay the same.

[*27]

It appeared by the answer, that the estate was of the yearly value of 600*l.*

Mr. Grant and *Mr. W. Agar*, for the plaintiff:

In general it is true, that tenant for lives, being himself one of the lives, need not renew, or be at any expense: but that is only, if the testator has not given any direction about it. If he has given any direction, that must be implicitly followed; and secondly, if the testator has pointed out any particular fund for renewal, the expense must fall upon that: if not, the expense of renewal must come out of the rents and profits of the estate itself. There is a clear intention in this will, that the lease shall be kept full. The tenant has no option to let any life remain vacant. The injunction upon each tenant is positive. The personal estate of the testator is applicable only for the first renewal. Another fund is provided under the power to mortgage: but that can only extend to one sum of 500*l.* The testator had no conception, that 500*l.* would be required upon every renewal. It may be inferred, that he thought that sum would be sufficient to assist the tenants for life for all the renewals, till some person having an estate of inheritance should come into possession. The expression "as aforesaid" refers to the words "from time to time;" and gives countenance to that inference. The fine upon the first renewal, when Hyatt's life was put in, was but 250*l.* Upon the next renewal it was increased to 500*l.* because the defendant chose to have three new lives. Now that sum would not be nearly sufficient.

If the testator had been totally silent, the Court must have applied the ordinary rule. The old rule was to put one-third upon

the tenant for life. *Verney* v. *Verney*, 1 Ves. Sen. 428; Amb. 88. *Lock* v. *Lock*, 2 Vern. 666, and *Graham* v. *Lord Londonderry*, cited in *Stone* v. *Theed*, 2 Bro. C. C. 426; also prove, that the Court will without any direction compel the tenant for life to renew, and to contribute to the expense; and *Graham* v. *Lord Londonderry* was the case of a jointress; who was herself one of the lives in the lease.† *The *dicta*, that a tenant for life, whose [*28] life is in the lease, shall not be compelled to contribute to a renewal, cannot apply, when by the intention of the testator the estate is to be continued, or from its nature that is to be presumed; as upon a marriage settlement. The defendant's life being in the lease can make no difference; for that is by his own act, not by the testator. The old rule imposing one-third of the expense upon the tenant for life has certainly been denied. The rule adopted in *Nightingale* v. *Lawson*, 1 Bro. C. C. 440, has been applied only to leases for years; and where the tenant for life was dead; and therefore it was easy to ascertain what portion of the term he had enjoyed. It has never been applied to leases for lives. There is no case, in which it has been settled by anticipation, upon what terms the renewal shall be made, and in what proportion the contribution shall be, respectively, where the benefit is uncertain. The rents of this estate are amply sufficient to bear the expense. It is no objection, that it is more for the plaintiff's benefit, if the testator has said, the tenant must renew, and has pointed out no other fund than the rents and profits.

If the old rule is to give way, and the whole expense is to be thrown upon the inheritance, the tenant for life must at least keep down the interest of that charge. In this case, besides the positive direction of the testator to renew, there is a ground, upon which it is impossible, that the defendant can be altogether exempted; for he has himself, as heir of the testator, a reversionary interest, subject only to the chance of the plaintiff's surviving him and leaving issue. If the plaintiff dies in

† The Court expressed a doubt, whether a tenant for life, who is one of the lives in the lease, can be compelled to contribute to the renewal; though he certainly may to surrender the lease for that purpose. See 1 Ves. Sen. 429.

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his life without issue, the whole benefit may be his. It is not likely, that he will waive that right; † and the plaintiff cannot bar it.‡ In *Low* v. *Burron*, 3 P. Will. 262, it was held that the remainder could not be barred. In *The Duke of Grafton* v. *Hanmer*, in a note to that case, the Duchess of Grafton, the tenant for life, joined in a fine, and till that was done, the Court conceived, the remainders could not be barred; and though according to *Wastneys* v. *Chappell*, 1 Bro. P. C. 457, and the other cases in Mr. Cox's note, 3 P. Will. 265, any alienation by

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the (*quasi*) tenant *in tail will be sufficient to bar the remainder, yet it has never been held, that his act, where he is not in possession, will do without the concurrence of the tenant for life; and such a construction would create an interest in this species of estate much greater than the analogy to an estate tail, which the Courts have always wished to preserve, would admit. It appears in *The Duke of Grafton* v. *Hanmer*, that there were trustees: for the assignment was to new trustees. This plaintiff in truth has but a contingent interest.

Mr. Graham and *Mr. Fonblanque*, for the defendant:

The general rule is clear, that a person having a limited interest for his own life in this sort of estate cannot be compelled to contribute. *Verney* v. *Verney* recognizes that principle; for the decision was in respect of the circumstance, that the tenant for life had not such a limited interest. There is but one cited case, *Graham* v. *Lord Londonderry*, to the contrary, which does not appear to be any where reported; and which I do not recollect to have been cited upon that occasion. And Lord THURLOW in his judgment in *Stone* v. *Theed*, 2 Bro. C. C. 248, wholly puts by such an authority. In 3 Atk. 393, there is a case between the same parties upon another point. That was in 1746; and it cannot be supposed, that Lord HARDWICKE in *Verney* v. *Verney* had forgot his own decree only four years

† An arrangement of that sort was suggested by the Court: but the defendant's solicitor said, he had no authority to consent.

‡ The Court seemed inclined to think, it might be barred by any conveyance.

before. That the defendant's life was put in by himself, and not by the testator, can make no difference. The authority, by which he did it, was given by the testator.

As to the proportion, if the defendant is to contribute in any degree, the rule that prevailed in *Verney* v. *Verney* has very properly ceased. The true objection to it is, not as Lord MACCLESFIELD has said, that it is too low, but that it does not at all hit the criterion. The rule adopted in *Nightingale* v. *Lawson* does. How frivolous is the distinction between estates for lives and terms for years renewable! In *Barnard* v. *Heaton*, a cause by consent in this Court a few days ago, a College lease for twenty-one years, renewable every seven years, was settled for ninety-nine years, if the leases should continue to be renewable. The tenant for life had lived out the whole of his interest; having exhausted two or three renewals. Your Honour adopted the rule in *Nightingale* v. *Lawson*. If the provision for renewal is compulsory upon the tenant for life, which is doubtful, it is clear the charge could not exceed 500*l*. The defendant paid 1,170*l*. upon the last renewal out of his own pocket: not conceiving, he had any *right to charge more than 500*l*. In process of time the [*30] fine may increase so that the interest would absorb the income of the tenant for life. The defendant secured, as far as he could, the effect of the testator's intention by getting rid of the old life and putting in the lives of those, who were all to take before the plaintiff.

The reversion in the defendant is in fact nothing. It is clear since *Low* v. *Burron*, that a person having such an interest as the plaintiff may cut off the interests of those behind by lease and release: but there are other modes of doing it. An equitable contract, an agreement, will do it. Articles in equity, as Lord HARDWICKE says in *Norton* v. *Fletcher*, 1 Atk. 525, will operate upon it as a recovery upon an estate-tail. Then where is the necessity of actual possession? A man may contract to sell a reversion; which will be enforced, whenever he comes into possession. The analogy to an estate-tail does not hold. In that case the concurrence of the tenant for life is necessary to a recovery on account of the tenant to the *præcipe*. That depends upon the statute *de Donis;* and can be barred only by that

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particular mode. This interest is perfectly unlike that; and is either an anomalous case, or a fee conditional at common law; and the plaintiff has issue. He therefore has it in his power now to disappoint that interest, in respect of which the defendant is called upon to contribute; for he may enter into a contract; which will be enforced, when the estate comes into possession. He has the power of acquiring the absolute interest; and the presumption is, that he will. The chance cannot be made the subject of calculation. *The Duke of Grafton* v. *Hanmer* decides nothing. The Duchess might have been called upon to surrender only to give effect to the new lease: but besides that it was a family arrangement, in which she concurred without difficulty.

Reply:

All the cases referred to are, where there was no obligation upon the tenant for life, imposed by the testator or in any other way, to renew; and his own life being in the lease, the Court has said, he should not be at the expense of what was done for the benefit of others. He might have refused to do any thing or give himself any trouble to prevent the expiration of the lease: but where the will is compulsory in directing the renewal, no
[*31] case * has been cited to shew, that it shall be at the sole expense of those in remainder; whose benefit the testator appears to have had in contemplation. A wearing interest given in succession with an injunction always to keep it up is like a house to be enjoyed by successive occupants with an injunction to keep it in repair. That must come out of the profits of the thing itself, like the case of the embankment put by Lord THURLOW in *Stone* v. *Theed*. In that case and *Nightingale* v. *Lawson* Lord THURLOW allows, that the injunction of the testator makes an important difference; and in *Stone* v. *Theed* the expression was merely considered equivalent to a direction to keep up the lease; not an express and minute declaration, as in this instance. *Lock* v. *Lock* is strong to shew, the tenant for life has no option; for the first taker was held bound to keep up the lease only by implication. It clearly was not this testator's intention, that the lease should drop, if it could not be renewed for 500*l*. That sum is

only given to enable them to do it. The fine must depend upon the bargain made and the number of lives, that had dropped. What is necessary beyond that sum must come out of the rents and profits as in the case, where an embankment is necessary, or repairs. The whole must be applied, according to Lord THURLOW, if necessary for those purposes; and so in these cases: the principal intention being to keep up the lease. Whatever is the authority of *Graham* v. *Lord Londonderry*, the act of the defendant in putting in his own life ought not to vary the right of the remainder-man. No answer has been given to the objection, that the rule cannot be applied prospectively. It cannot be known, how much each is to enjoy. There is no doubt of the old rule. The only doubt of Lord MACCLESFIELD was, whether the value of the estate for life was fairly estimated at one-third. *Nightingale* v. *Lawson* is not applicable: nor *Barnard* v. *Heaton* for the same reason; the lease being for years, and the interest determined; therefore it was known, how long they had enjoyed.

MASTER OF THE ROLLS:

The obligation upon them to renew must be intended to be compulsory to a certain degree; for Hyatt being authorised to put in his own life at the expense of the testator's personal estate could have no interest in the event of another life dropping to keep the lease full, and charge his life-estate, which was all he could get, with the interest of 500*l.*

I think, there is a right to charge 500*l. toties quoties*. It is very plain upon the will. I must compel the defendant to join in a *mortgage for that sum: but I can go no farther. The plaintiff will judge, whether it is worth his while to pay the excess. If he does, I shall order the estate to be barred, a surrender to be made, and the new lease to be to the defendant for life; remainder to the plaintiff and his heirs; for I think, the reversion may be barred without the concurrence of the tenant for life. [*32]

That doctrine of charging one-third upon the tenant for life can never hold. It was a most absurd rule.

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MASTER OF THE ROLLS:

Upon the death of Hyatt, one only of the lives in this lease remaining, of the age of eighty-four, the defendant succeeded; and he, what authority he had without the consent of the remainder-man I do not know, surrendered the lease; and took a new lease for the lives of himself and his two brothers; and upon that occasion he charged the estate with 500*l.* under the power given by the will. That he was competent to do, if he was competent to surrender the lease and take another. Afterwards upon the death of one of his brothers he put in the life of Hopkins in addition to his own life and that of his brother; and for that he paid 1,170*l.* If he had applied, I do not know, that according to my construction he would not have been entitled to charge another sum of 500*l.*: but I do not think, he can now make such a demand: the renewal being made without the consent of the remainder-man. In 1794 upon the death of John White there became another vacancy: and consequently it was competent to the plaintiff to call for an additional life; as he has by this bill.

It is first contended, that from the nature of these estates and the orders and decrees, that have been made upon property of this nature, wherever there is a devise of a leasehold interest for lives, and I suppose it is meant, for years, to several persons taking limited interests in succession, it is competent to every person interested to call upon the tenant for life to contribute some proportion towards the fine upon renewal. I have looked into all the authorities, that were cited; and have not yet found any such principle: on the contrary it appears from the case put
[*33] by Lord *HARDWICKE, 1 Ves. Sen. 429, of the tenant for life being himself one of the *cestuis que vie* to have been admitted, that upon a legal estate in such a leasehold interest it would not be competent to the remainder-man to call upon him; because he could have no interest in the renewal; though he intimates a doubt as to a trust estate, whether the *cestui que trust* for life, being one of the lives, could be compelled to contribute; as he had no benefit to result from the renewal. It is not necessary for me to decide that. I am of opinion, there is no one authority, that a remainder-man has a right to call upon the tenant for life

to make any contribution upon such an estate as this, if the estate is a legal estate. I do not mean to decide, that if it is to a trustee in trust for one for life, and after his decease to others in succession, the trustee might not be authorised to raise out of the estate for life a reasonable proportion in order to keep up the estate: but I have no difficulty in saying, that after the case of *Nightingale* v. *Lawson* I cannot conceive, the doctrine of one-third is in any case to be applied. It was a most unreasonable and absurd rule; for it being admitted that every person is to contribute according to his interest, a man of the age of eighty-four, with perhaps not a year to live, must be said to have as much interest as one of twenty-one. Therefore I have no difficulty in saying, that if the tenant for life is called upon to contribute any proportion of the fine, one-third is not the proportion, the Court would enforce.

The next question is what is the proportion? The fair proportion is, that the tenant for life shall pay the interest of the money advanced. What is the case of a devise in strict settlement, charged with a mortgage: suppose a bill is filed to foreclose the mortgage: was it ever contended, that the tenant for life is to pay one-third of the mortgage-money? The decree is always for a mortgage; and if a mortgage cannot be procured, that a proportion of the estate shall be sold. In the one case the tenant for life would lose the rents and profits of so much of the estate as was sold: in the other he would pay the whole interest. Therefore if this defendant is bound to contribute, it should be only by directing him to pay the interest: as the testator has done in a limited way.

But we must in this case resort to the will to see, whether the testator has intimated an intention, that the estate shall be kept renewed. I am of opinion he has done so. It is impossible to contend, that he did not mean the lease to be kept full: but it is *also impossible to suppose, he meant that contribution should [*34] be made, which, I think, would be the consequence, if he had given a mere intimation of an intention to keep the lease full: viz. that the tenant for life should pay the interest. What am I to understand by the words "not exceeding 500*l.*?" The

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testator could not suppose, that would be sufficient. From the value of the estate and the fine paid upon the first renewal it is clear, it could not be sufficient from time to time to pay all the fines, that from the casualties, that might happen, might be necessary. Therefore the only construction, I can put upon the will, is, that, whenever any life drops, it is competent to the tenant to charge any sum not exceeding 500*l.* for the renewal of each life; but that under the circumstances the defendant has no right to call upon the remainder-man to submit to a mortgage for that sum in respect of the fine paid by him upon the last renewal; for he ought to have applied upon the death of the first life, if he intended to avail himself of that clause: instead of that without any consent he put in first the lives of himself and his two brothers, and next the life of Hopkins. He must therefore take upon himself the whole burthen of the 1,170*l.* he has paid: but upon the true construction of the will I think, he has a right now to call for a mortgage: but that right is limited to 500*l.*; and he cannot call for more as a charge upon the estate than that sum; of which he must pay the interest.

The case of *Verney* v. *Verney*, which is much relied upon to prove, that in all cases one-third of the fine is the proportion to be paid by the tenant for life, when it comes to be looked into, is no authority whatever: for it expressly appears by the order to be by the consent of the tenant for life. It came on in the year 1749-50 upon the petition of the plaintiff, the son, reciting, that the late Master of the Rolls devised the lease to his wife for life, and afterwards to his son in tail; that one of the lives was vacant and the tenant for life ought to contribute a proportion; and she submitted to pay such part, as the Court should direct. It appears, she made no objection; and perhaps her life might be such as to make it a reasonable proportion. It is impossible to insist from that case, that Lord HARDWICKE thought, she was compellable to pay that.

The consequence of my opinion is, that the plaintiff has a right to call for a surrender and renewal of the lease; and that
[*35] 500*l.* *must be charged upon the inheritance of the estate: the

interest of that sum to be paid by the defendant for his life; and the principal to remain a charge.

In consequence of this opinion the Court proceeded to refer it to the Master to inquire, whether it was for the benefit of the several persons interested, that the sum of 1,170*l.* or any other and what sum should be paid for the fine and expenses attending the renewal; and in case more than 500*l.* should be necessary, that the defendant should declare, whether he was willing, that his estate in the said leasehold premises should be charged with the interest of so much money, as it might be necessary to borrow beyond the 500*l.*; and if he should consent, then that the trusts of the new lease should be to secure the 500*l.* already charged on the premises and the interest; and next the sum, the Master should find necessary to renew the lease; and, subject thereto, in trust for the defendant for life; remainder to the plaintiff and his heirs male; remainder to the defendant and his heirs: but in case the defendant should not consent, then that the plaintiff should declare, whether he is willing to advance the farther sum beyond the 500*l.*; and if he should consent, then that the trusts should be first to secure the 500*l.* already charged and the interest; and next the farther sum of 500*l.*, to be applied towards the renewal, and interest, and subject thereto, in trust for the defendant for life; and after his decease in trust to raise for the benefit of the plaintiff, his executors, &c. the farther sum, that he should advance for the renewal, with compound interest during the life of the defendant; and subject thereto in trust for the plaintiff, his heirs and assigns.

The counsel for the defendant being dissatisfied with this, as in the latter case it would bar the defendant's reversion, the MASTER OF THE ROLLS seemed inclined, that it should have that effect: but said, he would write down the minutes himself. A few days afterwards the following minutes were delivered out:

"Decree, that the plaintiff is under the will of the testator Charles White in the pleadings mentioned entitled to have the sum of 500*l.* and no more raised by mortgage of the leasehold

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estate in question for the purpose of procuring an additional life to the two lives now in being; and decree, that the plaintiff do go before the Master and declare, whether he is willing to advance [*36] *what shall be found necessary for that purpose beyond the sum of 500*l.*; and in that case let the defendant White and all other proper parties join in surrendering the said lease; and let a new lease be taken in the name of two trustees to be approved of by the Master; and let the trusts thereof be declared to be in trust for securing the sum of 500*l.* and interest already charged on the said lease of the premises; and in the next place to secure the further sum of 500*l.* and interest, to be applied towards procuring a renewal of the said lease; and subject to the said several sums of 500*l.* and 500*l.* in trust for the defendant for life; and after his decease in trust to raise for the benefit of the plaintiff, his executors and administrators,' such sum of money as shall be advanced by him beyond the sum of 500*l.* so to be raised as aforesaid for the purpose of paying the fine and expenses of such renewal and also such expenses of this suit as shall be paid by the plaintiff together with interest for the same during the life of the defendant White after the rate of 4*l.* per cent. per annum: such interest at the end of every year to be added to the principal and carry the like interest; and, subject to the aforesaid charges, in trust for the plaintiff in tail male, with remainder to the defendant White, as heir of the said testator, and to his heirs and assigns; and let the plaintiff pay unto the defendant the Bishop of Gloucester, and the defendant Thomas Hodgson, the mortgagee, their costs of this suit to be taxed by the Master; and reserve the consideration of the rest of the costs, until after the said Master shall have made his report; and any of the parties are to be at liberty to apply to the Court, as there shall be occasion."

Note.—Upon an inquiry directed on a re-hearing, the plaintiff appearing to have consented to the former renewal in 1786, the defendant was held entitled to charge 500*l.* towards the fine upon that as well as all other renewals, and the decree was varied accordingly. (*See* 5 Ves. 554.)—O. A. S.

On Appeal, *June* 9, 16, 1804.

1804.
June 9, 16.

ELDON, L.C.

Mr. Richards and *Mr. Agar*, for the plaintiff:

[9 Ves. 554]

First, as to the interest, it is clear the tenant for life must keep down the interest. The rule of the Court formerly was, that the tenant for life should contribute to the expense of renewal in every case, except where the devise is to a party, whose life is in the lease; who is not bound to renew: the proportion being one-third from the tenant for life, and two-thirds to be a charge upon the inheritance; according to *Verney* v. *Verney*. The same rule prevailed in *Graham* v. *Lord Londonderry*, cited in *Stone* v. *Theed*. * * *

Mr. Romilly, *Mr. Fonblanque*, and *Mr. Whishaw*, for the defendant William White, in support of the decree:

[9 Ves. 555]

The defendant does not admit, that the decrees pronounced at the Rolls are perfectly right. On the contrary, there is ground of complaint, not by the plaintiff, but by the defendant. Lord ALVANLEY has not taken into consideration the circumstance, that William White is one of the *cestuis que vie*. The decree proceeds upon the particular circumstances of this case. It is very difficult to discover the principle of the first decree. Certainly those in remainder might have said, they would have nothing to do with the renewed lease: but if they do claim the benefit, it must be on equitable terms. * * *

LORD CHANCELLOR:

[9 Ves. 556]

In *Nightingale* v. *Lawson*, 1 Bro. Ch. C. 440, in which I believe I was counsel, and some prior cases, this subject was very much discussed by Lord THURLOW. It is no reflection to say, the Reports do not do justice to it; for the subject is certainly very intricate; and it is not easy to follow a discussion upon so nice and difficult a question. From a note of my own it is certain, that the opinion of Lord KENYON, when at the bar, was, that there never had been a case in this Court, in which, where the Court had no other fund to deal with than that, which was constituted by the interest of the remainder-man in that leasehold property, that rule of one and two-thirds ever was applied. We must con-

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sider what the Court is to do in that case, as well as where there are other funds. What, for instance, in the case of an infant the Court would pay; where the infant might, or might not, ultimately take an actual interest. It is impossible to determine
[*9 Ves. 557] *ab ante* without the hazard of determining wrong. *Lord KENYON's opinion was, that at the death of the tenant for life, who renewed, it should be seen, what was the increased value of the estate purchased by him: then the payment made by anticipation should be considered; and then upon the principle of compound interest the value of that increased interest, purchased by the tenant for life, should be charged. If the remainder-man pays, it is put just the other way. It must be considered, that the lessor may refuse to renew; and the lease may run out. I have known family settlements, that had gone on for 150 years, so put an end to. It must also be considered as depending, not only upon the will of the lessor, but also upon the nature of the thing. It may be under such circumstances, that the actual interest the remainder-man takes may be nothing more than the opportunity, that the lease renewed *in præsenti* has secured to apply at the end of that term for another renewal; in which the remainder-man may take an actual interest. A third class of cases is, where the tenants for life renewing are not bound to make the renewal.

The case of *Verney* v. *Verney* we now know by authority to have been by consent. I do not deny, that it is to a certain extent an authority, as far as *dicta* are contained in it, as to the rule of one-third and two-thirds. In the report of that case that rule is said to have been considered by Lord MACCLESFIELD as not laying enough upon the tenant for life. If it is to be considered a general rule, not varying by circumstances, it must be so. That general rule will apply with more or less justice or injustice in every case. This had struck Lord KENYON, before he came upon the Bench, so much, that I know, his opinion (and I believe Lord THURLOW's opinion was in some degree assisted by his upon this subject) was, as it is very well expressed by Lord
[*9 Ves. 558] THURLOW *in *Stone* v. *Theed*,† that between the tenant for life and the remainder-man the distribution is to be so made, that if

† 2 Bro. C. C. 243.

the tenant for life is bound to pay in any degree, he ought to pay in proportion to the benefit he *de facto* took under the effect of the transaction; and the remainder-man ought also to pay with reference to his proportion of the benefit. That was the rule Lord THURLOW adopted in *Nightingale* v. *Lawson*. In that case there was great nicety of fact and calculation: but Lord THURLOW went upon some such rule; considering, what the interest of the tenant for life of the renewable term for years was in that term, which had to run out at the time of the renewal; and what benefit the tenant for life had received by the enjoyment of the renewed term from the period, when the old term would have expired; and his Lordship determined, that the remainder-man took that interest in the renewed term, which was *ultra* so much of the renewed term, as expired in the life of the person, who renewed the term: and that interest he thought was the benefit received by the remainder-man; and the value of that interest he made that person pay; considering also, that the purchase of that future enjoyment was made at an antecedent time; and that the tenant for life had several years before paid the value of that interest, which the remainder-man took several years afterwards; and an arrangement was made by compound interest as to that.

It could not have escaped Lord THURLOW, that the case might have been just the converse of that; that the tenant for life might not have had the means of renewing; and might have been obliged to borrow the money of the remainder-man of such renewable term. Then *the question would be, how the remainder-man was to have it determined, what part of that sum he would be entitled to demand against the tenant for life; and upon the same principle as in the former case Lord THURLOW must have said, he could not determine till the death of the tenant for life, whether the remainder-man ought to pay any thing. At the death of the tenant for life he could determine, upon the same principle as in the other case, what the tenant for life ought to advance to the remainder-man. It affords that difficulty, and is exposed to risk, with reference to assets, I admit. But the authority is very high; has stood 20 years; and does not involve nearly so much difficulty as belongs to the

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other supposed rule. I admit, the tenant for life may not be able to pay that sum. But that perhaps from the nature of the thing cannot be helped; and the utmost extent you can go is to make the tenant for life give security for the sum, that eventually may be due. But that does not afford a stronger objection than that of this Court laying its hands upon the funds of an infant remainder-man; and paying for his benefit; when he may have no benefit.

There is no difference between a renewable term for years and a lease for lives renewable. In the former case the difficulty does not arise so much, upon the probable value of a term, certain, as upon an estate for lives, in estimating, what is the value of that life, which may survive the three *cestuis que vie*; and that interest, to be paid for by the remainder-man; as the case may happen, that one, two, or three, lives may determine in the life of the man, entitled to the beneficial interest. Lord THURLOW's opinion in *Nightingale* v. *Lawson* and *Stone* v. *Theed* was, and Lord ALVANLEY has distinctly said, that the old rule is exploded; as it is undoubtedly as to mortgages. Their opinion is, that it is

[*9 Ves. 560]

better to determine *the proportion upon fact than speculation. It is enough for me, that Lord ALVANLEY has expressly said, the old rule is exploded, upon the authority of Lord THURLOW in those two cases; and the subject was very anxiously, frequently, and gravely, considered by Lord THURLOW in *Nightingale* v. *Lawson*, before he determined it. It must therefore be taken that the rule of distribution in one and two-thirds does not prevail at present; and as to mortgages and charges the Court has given so much authority to the alteration as is inconsistent with that rule.

Lord ALVANLEY states, according to the report of this case, that the tenant for life is to pay nothing but the interest. I do not agree to that; for if the rule be, as laid down in those other cases, he may have nine-tenths of the benefit of the interest, purchased by the principal. In the case of a tenant for life of an equity of redemption and the remainder-man in tail or in fee the whole inheritance being charged with the mortgage, it is fair, that the tenant for life shall only keep down the interest; for the whole charge is upon the whole inheritance; and the natural

division is, that he, who has the *corpus*, shall take the burthen; and he, who has only the fruit, shall pay to the extent of the fruit of that debt. But these interests, whether for lives or years, are in their nature temporary. I cannot therefore apply to them that rule, as to another species of estate, distinct in the very point, that is to furnish the rule. Therefore that position, that the tenant for life is bound to pay the interest, must be understood with this allowance: that he is farther bound to have charged upon him a due proportion of the benefit he takes in the estate by the application of the principal, paid for the purchase of the renewed interest in the estate.

If therefore this stood upon the general principle, laying entirely out of the case the 500*l.*, if it was to be taken as the simple case, in which a tenant for life was bound to renew, or, though not bound, having renewed, and 670*l.*, supposing that the excess beyond the 500*l.*, was paid for the renewal, the rule adopted by this decree would not be right: but the tenant for life ought to be charged, not with a third (for I do not think that the rule,) but with some part of the fine so paid. But I do not think, this is a case to be determined upon these principles; and I differ a little from the MASTER OF THE ROLLS upon that. My opinion upon this case is, that this testator thought, he had himself provided a sufficient fund for the purpose of these renewals; and it is perfectly consistent therefore with his will, that the persons, who were the tenants for life, should make themselves *cestuis que vie;* and farther, I think the testator intended it. It is very clear; a [9 Ves. 561]

person entitled for his own life is not bound to renew, except from the terms of the will or the nature and formation of the gift to him you can imply an intention, that he should be obliged to renew. If that intention can be implied, I agree, he is not at liberty to put himself as to contribution in a different situation, by making himself one of the *cestuis que vie*, from that, in which he would be, if any other life was in the lease; unless upon the whole will it appears, that the testator intended, that he should be at liberty to make himself one of the *cestuis que vie*. It occurred to the testator to secure for some of those, who were to take, but not for all, who might take, under these limitations, a fund for procuring these renewals; in order, as it is expressed, "to keep

WHITE v. WHITE.

the lease full during their respective lives:" from which I infer, that his idea was, that the provision he made would be sufficient for that purpose; and then it was of no consequence, whether
[*9 Ves. 562] they put in their own lives or those of others: *"and to enable them to pay the fine and fines of such renewals:" not "towards" the payment. I cannot hold that, if the defendant was at liberty to put in his own life, and purchased the life of Hopkins, the plaintiff was not bound to contribute. The first decree therefore went much too far. If the true construction of the will is, that the testator meant to provide a fund for the renewal of the leases, and it was indifferent therefore, whether the tenants for life were themselves made the *cestuis que vie*, (and there is strong ground for supposing, that was the intention), then the defendant was not bound to renew; and then all the interest acquired must be paid for by the remainder-man; if he thinks proper to take the benefit. If the intention of the decree was not to charge interest upon the 500*l.*, it is wrong in that; for that charge was brought upon the estate by the direction of the testator himself; and he must mean the rents and profits to keep down the interest. The question is only, whether the language of the decree is quite proper in that respect. It is not necessary to make any formal declaration upon that; but with the admission, not taken down, that the defendant ought to have kept down the interest, let the decree be affirmed. The ground of my judgment is, that the testator did not mean to impose upon the tenants for life the obligation to renew; if raising the 500*l.* would not enable them: but the will did give the remainder-men a right to call upon the tenant for life to permit the estate to be mortgaged to the extent of 500*l.*; if the remainder-men thought proper to take the rest upon themselves.

LADY SHAFTESBURY *v.* ARROWSMITH.

(4 Vesey, 66—72.)

1798.
July 24.

LOUGHBOROUGH, L.C.

[66]

An heir at law cannot call for an inspection of deeds in the possession of the devisees. Bill by heir in tail against devisees: on motion an inspection was ordered of all deeds of settlement, admitted to be in the possession of the defendants, creating estates in tail general: but no farther.

SIR JOHN WEBB by his will devised all his estates to Arrowsmith and Butler in trust.

After a suit had been instituted for the purpose of establishing the will, this bill was filed against the trustees: stating, that the plaintiff is heir at law and customary heir of the *testator. The bill also stated, that the plaintiff is heir of the body of the testator; that she is totally ignorant, whether she is or is not entitled to any and which of the estates devised; that the estates are in the possession of the defendants; that there were several settlements; and that it is impossible for the heir to know her title without an inspection of the deeds. The bill therefore prayed, that the defendants may be decreed to produce and shew to the plaintiff all the several title-deeds and writings, which shall appear to be in their possession; and, if it shall appear, that the testator was not seised in fee, or if any of the estates were copyhold not duly surrendered to the use of the will, or if the will was not duly executed, or if it shall not appear, that the testator was of sound mind at the time of execution, or if any fraud was practised, then that the several title-deeds, settlements, and instruments in writing, relating to such of the said estates as the plaintiff shall appear entitled to either as heir at law, customary heir, or heir of the body, may be decreed to be delivered up to the plaintiff.

[*67]

The defendants by way of schedule to their answer set forth an abstract of several settlements in their possession.

A motion was made on the part of the plaintiff for an order, that the deeds might be produced for her inspection; and that they might be deposited in the Master's office.

LADY SHAFTESBURY v. ARROWSMITH.

Mr. Mansfield, *Mr. Sutton*, and *Mr. Cox*, for the motion:

In *Bettison* v. *Farringdon*, 3 P. Will. 363, the party was not heir, except as to an honour descending upon him; and it was admitted there, that it would be done at the hearing. So in the *Earl of Suffolk* v. *Howard*, 2 P. Will. 176, which was a bill on the part of the heir, it is plainly implied, that the question was not, whether there was to be a production of the deeds, but whether it could be done upon motion, or was to wait for the decree. The heir without an inspection cannot tell, what is the title of the ancestor; whether in fee, or in tail. He must assume the title of the ancestor to be a seisin in fee. I believe, Lord HARDWICKE considered the rule established, that the heir has a right upon filing a bill against the devisee to have the title-deeds produced; and Lord MANSFIELD frequently spoke of this right in the heir. *Burton* v. *Neville* before Lord THURLOW is directly against the cases, I have mentioned; in the last of which not only an inspection of the deeds creating an intail or making a tenant to the *præcipe* was granted, but of all deeds and writings.

[*63] *The claim as heir in tail is exactly according to the cases in Peere Williams. Lord THURLOW thought the heir entitled to the deeds creating the intail and the prior title-deeds.

In this case six or seven family settlements of these estates have been made from time to time. They are stated in the abstract; but the plaintiff has not seen the particulars of them nor the deeds making tenants to the *præcipe*. She has a right to all those. The Court always indulges the heir with an opportunity of knowing, how he is disinherited. The heir is always under this difficulty; that not having the possession of the deeds he cannot point out those, under which he has an interest. Is there any other mode of ascertaining that than by the production of all? If it is once ascertained, that the devisor was seised in fee, certainly the heir can only ask, whether the will is effectual: but in this case a title in tail is asserted.

Attorney-General, *Solicitor-General*, and *Mr. Thomson*, for the defendants:

This application involves a proposition of great consequence: so much so, that perhaps the Court would hesitate to grant it

on motion. The bill is very peculiar; for first it considers the plaintiff as heir at law: then states a possibility, that she may be heir in tail; and in that mixed character she calls for the relief, to which she may be entitled, if she is proved heir in tail: but she does not assert that positively, or pray a discovery as to that. * * She might say, as they have got the title-deeds, she has a right to discover, whether or not there was an intail, under which she could claim: they might answer, that they could not find it; or they might refer to it so as to entitle her to the production: but the bill is not framed with that view. It is only a loose allegation, that she does not know but that she may be entitled in tail. It is necessary to have a degree of certainty in the bill, that the defendants may know what defence to make. Suppose, an intail was stated, the defendants might plead the deeds of the recovery: but if the intail is not distinctly stated, they are ousted of that defence. * * *

The heir in tail has a right to inspect and be enabled to pro- [69]
duce the deed creating the intail: but then the moment he proves himself heir of the body of the person last seised, he puts it upon the other party to meet him at law upon that title. The heir in tail has no other right than to see the deed creating the intail and the prior deeds, but not to call for the deeds, by which that intail is defeated; which is the point to be tried at law. * * *

Reply:

The plaintiff says, she is heir in tail; and if any intails were [70]
created, which are not barred, she is entitled under them. What more can she say, when all the deeds are in the hands of the defendants; which is admitted? What more can she state than that she is ignorant, whether the devisor was entitled in fee, and had power to dispose? The answer refers to a great many deeds without stating the contents: but apparently there are many settlements creating intails. It is admitted that the plaintiff has a right to the inspection of deeds creating intails: as to anything else, *Burton* v. *Neville* is an authority against it: but it stands in opposition to the cases in Peere Williams. It is true, in both these cases an intail is stated: but the order appears to go far beyond the production of those deeds; and goes clearly to

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the deed creating the tenant to the *præcipe;* and the rest only refers to the time, when the production is to take place.

LORD CHANCELLOR:

It would be a very delicate point to order a general inspection into all deeds and settlements on behalf of a person claiming in the mere character of heir at law. I do not find any spark of equity, upon which that application could be made to this Court and supported. The title of the heir is a plain one; and it is a legal title. All the family deeds together would not make his title better or worse. If he cannot set aside the will, he has
[*71] nothing to do with the deeds. He must make *out his title at law, unless there are incumbrances standing in the way, which this Court would remove in order to his asserting his legal right. There the principle of equity interferes. The cases in Peere Williams are those of an heir in tail. A will is no answer to an heir in tail: a will established is an answer to an heir at law. An heir in tail has beyond the general right such an interest in the deed creating the intail, that the Court, as against the person holding back that deed, would compel the production of it. His right also is upon a very plain ground: to remove an impediment preventing the trial of a legal right. In the two particular cases cited, (I do not go quite along with the reasoning in either of them,) the Court did no more than what according to the state of the case was perfectly innocent, and led to no mischievous consequence: for the production of the deed creating the intail, where the party could not get at it without the aid of this Court, I have already stated, it is in the power of the Court to order: as to what more was done, he being tenant in tail, and that admitted, the Court by enabling him to look at the deed to make the tenant to the *præcipe* only put him in the situation, he would be in at law upon an ejectment. Where the tenant in tail has possession of the deed, that makes the intail, and can prove the heirship in tail, it is put to them to produce the recovery. All the proceedings of necessity appear upon the trial, and must be brought forth. They cannot set out the judgment in the recovery, but must set out the whole proceedings. I remember a very long title upon a special verdict. The consequence was,

that it was enormously swelled by setting out one or two recoveries. A proposition was made to the Court, whether it would not be better to state the fact, that the recovery was suffered: but upon consideration the Court thought it quite necessary to shew upon the record, that it was well suffered. The Court therefore in those cases gave him no discovery, that in the course of his legal pursuit he would not come at; and the only advantage was to give him a little time to consider, whether it would be worth his while to go on to prosecute his right at law. I rather imagine (it is a bold conjecture upon Peere Williams's report) that "at the hearing" means at the trial. There is no hearing upon a mere bill of discovery. Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body, it has been very properly stated, that it may shew a title in another person, if the intail is not well barred. It may set up a title, not *to the benefit of Lady [*72] Shaftesbury, but to the injury of the devisees; indulging a speculation to the prejudice of parties, whose interest this Court has no right to invade.

I apprehend, they have no objection, that all the deeds purporting to be deeds of settlement creating intails shall be produced for inspection: otherwise it must go on to pointing interrogatories and asking for an answer. The defendant Arrowsmith must give himself the trouble of inspecting the deeds, and answering upon oath, whether they create an intail, or not. Wherever you find a deed of intail, it would be very idle not to produce it, and also the deed, which destroys the intail: it would be no breach of duty in the trustee to give that qualified communication of the deeds: but rather the contrary. The plaintiff has a right to an answer to this question: are there any deeds, that contain a limitation in tail general?

As to the other part of the motion, it would be very proper to make an order for the deposit of the deeds in the other cause.

The order pronounced was, that the defendants shall give inspection of all deeds of settlement, set out in the schedule, creating estates in tail general.

1798.
Nov. 12, 13.

LOUGH-BOROUGH, L.C.

[180]

THE DUKE OF LEEDS *v.* THE EARL OF STRAFFORD.

(4 Vesey, 180—186.)

Upon the bill of the lord a commission issued to distinguish copyhold lands within the manor, comprised in admittances produced, the last in 1693, from freehold, and compounded from uncompounded copyholds, and to ascertain the boundaries; and if they cannot be distinguished, to set out lands of the tenant, of equal value with so much of the copyhold lands as cannot be distinguished.

THE bill stated, that the plaintiff and his ancestors for a great number of years have been, and the plaintiff still is, seised in fee of the manor of Wakefield, and as lords of the said manor entitled to all the rights, privileges, &c. thereof. The lands within the manor are partly freehold and partly copyholds
[*181] *holden of the said manor: and the copyholds are of two sorts; viz. copyholds compounded and copyholds uncompounded: the copyholds compounded being held by the annual lord's rent or grave rent, and fine certain of three years lord's rent upon every admittance, the owners of such lands having formerly agreed with the lord for a composition for having such fines ascertained in perpetuity; the uncompounded copyholds being copyholds held by annual rent and fines arbitrary at the will of the lord. The manor has been immemorially divided into graveships comprising two or three townships. The office of the grave is to collect the rents and pay them to the steward. All the copyhold lands were originally uncompounded. A composition took place with the Crown, the manor being then vested in the Crown, about the beginning of the last century upon petition by the defendants to an information filed by the Attorney-General in the Duchy Court of Lancaster.

The bill farther stated, that the defendant Lord Strafford and his ancestors have been possessed for many years past of considerable copyhold premises situate in the manor; the greatest part being uncompounded, and some small part only compounded; and as the defendant alleges, also possessed of and entitled to freehold lands in the said manor; and the said free-

† *Searle* v. *Cooke* (1890) 43 Ch. D. 519, 59 L. J. Ch. 259.

DUKE OF LEEDS v. EARL OF STRAFFORD

hold lands lie intermixed with the said copyhold estates and premises without any boundaries or visible distinguishing marks; which is much increased by the great length of time since the admittance of the last ancestor or owner of the copyhold estates, though the same were constantly allowed to be copyhold held of the said manor, and by several of those admittances in succession having been granted in general terms without any particular description of the premises or the metes and boundaries thereof being presented; which the owner neglected to present or make known. The last admittance now in the possession of the Earl of Strafford is that of Thomas Wentworth, his grandfather's brother or ancestor in the year 1693, upon the death of Sir William Wentworth, his father, of all and singular the customary messuages, cottages, closes, lands, tenements, rents, reversions, and hereditaments, whatsoever, which late were the copyhold inheritance of Sir William Wentworth, and holden of the lord of the said manor by copy of court roll, with the appurtenances *situate within the graveship of Wakefield, &c.; to hold to him, his heirs, and assigns for ever by rents and services according to the custom of the said manor; and upon which such admittance a fine of 83*l.* 15*s.* viz. 3*l.* 15*s.* for lands compounded, and 80*l.* for lands uncompounded, was paid; and the same premises or some part or parts thereof are or is in the possession of or claimed by the Earl of Strafford: but no admittance has been had since notwithstanding many applications on the part of the plaintiff. The said Thomas Wentworth, afterwards created Earl of Strafford, upon the 10th of April, 1732, surrendered all his copyholds, whether compounded or uncompounded, within the plaintiff's manor to the use of his will; and he died in November, 1739, leaving William his only son and heir at law according to the custom. The said surrender was not brought into Court till 1740: nor does it appear by the court rolls, that any will of the said Thomas Earl of Strafford was ever produced; and William, late Earl of Strafford, was never admitted tenant; though he continued in possession of the said copyhold premises from the death of his father in 1739 till his own death in March, 1791; and upon his death the present Earl, under a settlement, entered upon the

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DUKE OF LEEDS v. EARL OF STRAFFORD.

said copyhold estates, and has been ever since in possession without being admitted. Many applications were made to the late Earl to be admitted, and to have the copyhold premises ascertained and distinguished from the freehold, and the compounded from the uncompounded. Certain copyhold rents were paid uniformly and constantly down to the year 1779 or 1780 for the said premises; and the several persons uniformly admitted, they were copyholders. Applications were also made to the present Earl.

The bill charged, that all the Earl of Strafford's said copyhold estates are uncompounded; that it is incumbent upon him, in case he claims any exemption from payment of uncompounded or arbitrary fines, and if he pretends, that any part of the said estate is freehold, to ascertain and distinguish the same, and describe the boundaries, and upon what occasion they became compounded. The admittance of 1693 contains lands nearly, if not fully, equal to the whole of the lands now holden or claimed by the present Earl of Strafford within the manor: but since
[*183] that time various changes have taken place *in the names of the fields and parcels of land, &c. and the boundaries and other distinguishing marks thereof, with the privity and assent and concurrence of the defendant and his ancestors, and without the privity of the plaintiff and his ancestors; but the defendant can alone distinguish and set forth the boundaries. From the length of time, change of names, boundaries, and other circumstances, it is impracticable to the plaintiff to find out and ascertain the possessions of the defendant within the manor without a discovery. Upon the admission in 1693, which was to compounded and uncompounded copyholds indiscriminately a fine of 3*l.* 15*s.* was paid for such part as was alleged to be compounded, and a fine of 80*l.* for such as was uncompounded.

The bill prayed a discovery; and that the parties entitled to the said copyhold estates may come to be admitted; that an account may be taken of the fines due; and if any of the defendants shall pretend to have any freehold lands intermixed with or contiguous to the copyhold, or that the copyhold lands or any parts thereof are of the nature of compounded copyholds, that they may discover the boundaries and descriptions of such free-

hold lands and compounded and uncompounded copyholds; and that, if necessary, a commission may issue for the purpose of distinguishing the said freehold lands from the copyhold, and the compounded copyholds from the uncompounded, and for dividing and marking the same out by proper metes and boundaries; and in case the boundaries have been so confounded, that the lands of the respective descriptions aforesaid cannot be set out and ascertained, then that out of the whole of the said lands so much land may be set apart to answer the annual rents and fines as being of such annual value at any time at which it appears from the deeds the copyholds were of an expressed annual value shall at the time be of proportionable annual value; and that a proper part of such lands may be held as compounded, and a proper part as uncompounded, lands, in case the defendants are entitled to hold any part as compounded.

The defendant Lord Strafford by his answer stated, that he does not know, which of the lands held by him in the plaintiff's manor are freehold, and which copyhold; nor can *he distinguish the compounded from the uncompounded, or set forth the particular descriptions and boundaries. [*184]

The facts charged by the bill were established by the evidence of persons, who had been stewards of the manor: but they could not distinguish the copyhold lands nor the compounded from the uncompounded. The neglect to admit proceeded from the negligence of former stewards of the manor; one of whom was on that account dismissed in 1780. A rent of 4*l*. 14*s*. 6*d*. per annum was paid in respect of Lord Strafford's copyhold lands within the manor down to the year 1779.

Applications were made to Lord Strafford's agent; who said, Lord Strafford would pay the usual fines in respect thereof, provided they could be ascertained and distinguished. In 1792 the defendant Lord Strafford upon an application by the steward said, he should insist upon all his lands within the manor being freehold; professing at the same time, that he was ready to be admitted to whatever the plaintiff could prove to be copyhold.

The late Earl of Strafford admitted in conversation with the steward, that he held the copyholds, and thought, he had been

DUKE OF LEEDS v. EARL OF STRAFFORD.

admitted, and that by some mistake it was not entered upon the rolls; for the lord's rents had been regularly paid; but he believed, they were some years in arrear; and he offered to pay the arrears.

Several letters from the late Earl of Strafford to the steward to the same effect were produced.

The witnesses did not believe, there ever had been any enfranchisement.

Attorney-General, *Solicitor-General*, and *Mr. King*, for the plaintiff contended, that the commission should issue, as much the best way of making the inquiry. They cited *Ambler's* case, in the Exchequer, upon an information filed in 1770 by Mr. Ambler as grantee of the Crown of quit-rents in the manor of Bray: The Court had no doubt, that they were bound in the first instance to send a commission. In some cases they did ascertain the lands: in others they said, they could not; but the ancestors held subject to quit-rents. The Court said, it was their duty to have distinguished, out of what lands they were to issue; and therefore a portion of land should be set out, to be subject to the quit-rents.

[185] *Mr. Mansfield*, *Mr. Grant*, and *Mr. Grimwood*, for the defendants:

Upon this demand for a commission to endeavour to distinguish copyhold lands from freehold, and copyholds compounded from copyholds uncompounded, at the distance of a century, the Court will exercise its discretion. There is no instance of granting such a commission at such a distance of time and under such circumstances of confusion. The evidence as to the late Earl does not amount to any thing like an express admission, that he held copyhold lands. It shews, he had a suspicion: but it appears from the letters, that what he said was only in answer to the applications upon the part of the Duke of Leeds, giving credit to their representations. A probable ground must be laid to shew, a commission will farther the ends of justice and ascertain the rights of the parties. The plaintiff professes, that by the neglect of his own stewards

he is utterly unable to ascertain his rights; that he cannot point out a single acre, which is held of the manor; but that formerly there were lands held by Lord Strafford of the manor. All the evidence for the plaintiff is merely of conversations with the late Earl of Strafford, and letters, from which it is inferred, that there must be some copyhold lands held of the manor: but they do not profess to be able to point out any one field in that situation. The Court may be satisfied, that a party has some right, if he has evidence of it: but if they have been so negligent as to lose all evidence of their rights, how can the Court assist them? The principle must be mere conjecture. The plaintiff states, that he has no knowledge upon the subject. The defendant and the witnesses have sworn, they have none. The correspondence throws no more light upon it. At this distance of time an enfranchisement must be presumed.

LORD CHANCELLOR:

The bill assumes, that the plaintiff knows, there are copyhold lands; but that he does not know the boundaries; because they are confounded with freehold lands and changed; and therefore he cannot exercise his legal right. It is the duty of the tenant to keep the boundaries. That is the foundation of the bill. The confusion of boundaries does not infer any negligence on the part of the lord; for the tenant is in possession of the land. The evidence of the conversation of the late Earl of Strafford is the admission of a tenant, that he holds copyhold lands. There is a discussion about the arrear of rent. What is there to ground any presumption of enfranchisement *upon? [*186] There are only two events, the deaths of the two Lord Straffords, the only two periods, at which there could be any inquiry about it. The boundaries are necessarily greatly confused: but there are, I dare say, many people, who can name all these closes. The only thing, that can be done at present upon the bill, is to direct the commission.

Direct a commission to issue, to inquire, whether the defendant, the Earl of Strafford, is in possession of any, and which, of the copyhold lands within the manor of Wakefield, to which Thomas Wentworth was admitted in 1693, &c. (stating the several

DUKE OF LEEDS v. EARL OF STRAFFORD.

admittances appearing in the cause); and let the commissioners distinguish, which of the said copyhold lands are compounded, and which are uncompounded, and distinguish the above copyhold lands from the freehold lands of the defendant within the said manor; and ascertain the boundaries thereof; and the commissioners are to set out, distinguish, divide, and ascertain, the same by metes and bounds accordingly; and if by reason of the confusion of boundaries, or alteration of names, or any other circumstances, the said commissioners shall not be able to distinguish or ascertain the particular copyholds or any of them, in that case they are to set out such a quantity of lands now in the possession of the defendant the Earl of Strafford within the said manor, as may be of equal value with the said copyhold lands, or so much thereof as cannot be distinguished or ascertained as aforesaid; with the usual directions for all deeds, books, papers, and writings, to be produced before the commissioners upon oath; and with liberty to them to examine witnesses upon oath.

1798.
Nov. 21, 22.

LOUGHBOROUGH, L.C.

[186]

MATHEWS *v.* WARNER.*

(4 Vesey, 186—210. 5 Vesey, 23—24.)

Testamentary paper headed Plan of a Will and similarly endorsed, signed by the testator and internally referred to as his last will and testament, containing legatory words of present gift, presumably no will, but only a project of a will, not a complete testamentary disposition.

WILLIAM MATHEWS, late principal storekeeper of his Majesty's dock-yard at Deptford, died on the 8th of April, 1790, about the age of eighty, leaving the following testamentary papers:

"2d Nov^r. 1785. A plan of a will proposed to be drawn out as the last Testament of William Mathews, storekeeper of His Maj^ys yard at Deptford——After the usual prelude, being in

[*187]

*health, sound of mind, &c. Imprimis I give unto Miss Issabella Johnson, daughter of my good friend Edw^d Johnson, Esq; of the lottery office, the sum of sixty pounds p^r ann. for her natural life, to be paid her half-yearly, out of the dividends

* *Whyte* v. *Pollok* (1882) 7 Ap. Ca. 400—411.

arising for interest of the several navy bills I have lately subscribed in the 5 p^r C^ts and twenty pounds for mourning, and also one hundred pounds to my aforesaid good friend M^r. Johnson, if I die before him. After the death of Miss Johnson, the capital with what other the 5 p^r C^t Stock I may have, I bequeath to Holland Ann L'Epine and Maria L'Epine, sisters, daughters of my good friend Edw^d L'Epine Esq.; in an equal division between them, and if one dies unmarried, the whole to descend to the survivor, and if both dies unmarried, or without children, to descend to the children of my first cousin John Fisher Clerk, formerly of Bodmyn, Cornwall, and to my first cousin Timothy Slade of Ledbury, to be divided equal between them. My household goods to be sold in part, unless sufficient moneys can be found to pay my debts and legacies. My plate, and what they chuse to save of my household goods, I bequeath to Holland Ann L'Epine and her sister Maria, to be divided between them; to whom I also leave all the residue of my fortune or effects, after giving one hundred pounds to my good friend M^r L'Epine, and also one hundred pounds to my late son-in-law Isaac Warner. Must pray my burial may be very plain and not expensive; could like to be buried, with the Warners' permission, with my dear girl, in their vault, Leigh Church, but by no means to be buried at the Old Church, Deptford. I appoint my good friend M^r. Edw^d L'Epine and my good friend M^r. Edw^d Johnson, my executors, to see this my last will and testament complied with. Dated at Deptford, 2^d Oct^r 1785.

W^m MATHEWS.

"I must not forget my good friends Miss Mary and Miss Charlotte Howell, who desire will eccept of five guineas each for ring to wear in remembrance of me: 6^th Oct^r. 1785. W^m MATHEWS."

This paper was indorsed thus:

"2^d Oct^r 1785

"A plan designed for the last Will and Testament of Will^m Mathews, storekeeper of His Maj^ys Yard, Deptford."

The other paper was as follows: [188]

MATHEWS v. WARNER.

"27th Decr. 1789.

"Finding myself in a very precarious state of health, the following is the plan I propose to draw Will from, abrogating all the others I have already drawn out. IMPRIMIS, I give to Miss Isabella and Catherine Jones, both of Eltham, one thousand pounds 5 pr Cents. to be divided between them equally, being a legacy I always intended for their aunt Isabella Johnson, for her great friendship of her's and her father's always shewed towards me; to Mrs. Jones the mother of the young ladies, I bequeath one hundd 5 pr Cts; to Isaac Warner, my late son-in-law, one hundred; to Matthew, his son and my godson, one hundred. I give to Mr. John Clewer at Botley, and ,,

The former of these papers is written on a piece of official paper intersected with lines, containing printed at the top the different articles, of which the deceased in his situation of storekeeper had the care; and the latter is written on the back of a letter addressed to the deceased.

Both of them were in the hand-writing of the deceased.

The former was found in the deceased's office in the dockyard, loose in his desk, in which there also appeared some official papers: the latter was found in the deceased's bureau in the parlour of his dwelling-house in the dock-yard, in a bundle of letters and papers.

Edward Johnson died in November, 1787. Edward L'Epine died some months afterwards, and Isabella Johnson in March, 1788. Holland Ann L'Epine about a year and a half before her father's death married Captain Montague, and died without leaving any child about three months afterwards. Maria L'Epine soon after her father's death became insane without hopes of recovery.

Caveats were entered on the part of several persons, claiming as next of kin to the deceased, and of others, claiming as legatees under these instruments; and a suit was instituted in the Prerogative Court of Canterbury.

[*Note.*—A great deal of parol evidence as to the intention and declarations of the deceased was produced in the cause,

but the judgment renders it unnecessary to state such evidence here.]

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On the 8th of July 1793, the Judge of the Prerogative Court† pronounced against the validity of the paper, dated the 27th of December, 1789, and for the validity of the paper, dated the 2d of October, 1785, and of the codicil thereto, dated the 6th of that month.

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Upon an appeal to the Court of Delegates‡ on behalf of Richard Mathews, one of the next of kin of the deceased, from that part of the sentence, which established the will and codicil, dated the 2d and 6th of October, 1785, the sentence was affirmed on the 10th of May, 1798.

A petition was presented to the King in Council, on the part of the appellant, who in the course of the proceedings before the Delegates had been admitted a pauper, praying a commission of review; and by an order of Council, dated the 31st of October, 1798, the petition was referred to the Lord Chancellor to report his opinion thereupon.

Attorney-General, Dr. Battine (the King's Advocate in the Admiralty), *Mr. Pemberton*, and *Mr. Bayley*, in support of the petition:

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* * * Upon the face of this paper it is not intended as a testamentary disposition. There is no present disposition. The deceased never intended by signing it, that it should immediately operate. There are many very sensible passages applicable to this subject in Shep. Touch. 404 to 408.

The paper, upon which this is written, the place, in which it was found, and the alterations, that took place as to the persons named, strongly confirm the clear result of the evidence given on the allegation of the next of kin, that the deceased never intended this as his will.

Sir John Nicholl (*Advocate-General*), and *Mr. Grant*, in support of the sentence:

† Sir William Wynne.

‡ Sir Francis Buller, Bart., Sir Beaumont Hotham, Mr. Justice Heath, Dr. Swabey, Dr. Coote, and Dr. Parson.

MATHEWS v. WARNER.

[203]

* * * This paper is in substance and form (except in the description) a complete will; giving directions for his funeral, appointing executors and residuary legatees, and signed and dated. It is in no degree inofficious; for in case of the death of the Miss L'Epines unmarried and without children the property is to go to branches of his own family. For what purpose could he have written his name in this paper, if it was a mere memorandum? No other paper than these two has ever appeared. The evidence therefore, that speaks of a will, he had made, must mean this paper of 1785. The distinction, the Courts have always held, is this: if the paper is subscribed, the presumption is, that it was intended to give it a permanent effect; and no parol evidence can be admitted to shew, that intention was abandoned: but if the paper remains incomplete, particularly in point of disposition, the presumption of abandonment does exist; and there parol evidence may be admitted. Though he has called this a plan, he has also called it his last will and testament. The act, he has done, bears every characteristic of what he has once called it, his last will. It is not future intention. It is present, complete, gift throughout; a disposition of all his fortune. If he had occasionally slipped into words of present disposition, no great stress could have been laid on them. But here the words of present disposition are uniform. Every sum given is given by such words. The instances, in which he speaks in the style of memorandum, are, where discretionary acts are to be done; as in the direction to sell the household goods: so as to his burial. As to the expression in

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the codicil, that he must not forget his good *friends the Miss Howells, he proceeds immediately to give legacies to them; and puts a date and signature to it. * * *

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The reply was stopped by the Court.

LORD CHANCELLOR:

[After stating that his judgment was formed irrespectively of the parol evidence as to the intention and declarations of the deceased proceeded as follows:]

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Another part of the evidence here consists of facts and

circumstances, the existence of which very much affects the question, whether there is a will, or not. Suppose, I was trying it in a court of law upon an issue, *Devisavit, vel non*, upon the view of the paper, and the evidence, how it was discovered, among office papers, in an office desk of a storekeeper; with the additional circumstance, that another paper *in his hand-writing [*209] was found in his house among his private papers; with the circumstance of his declaration in that second paper, which, though it could not be set up as a will, because it is quite unfinished, yet is a declaration as to the legacy he intended for Mrs. Johnson, and directly supports the evidence of Mrs. Jones, that he had by a will given a legacy to Mrs. Johnson of 1,000*l.* 5 per cents. He has said directly in that paper, that he intended to give her 1,000*l.* 5 per cents. The comment upon it is, that he was mistaken; that he must have been referring to the gift made in the prior paper, not of 1,000*l.* nor of the interest of it, but of an annuity of 60*l.* a year, charged upon the interest of a sum of money in the 5 per cents. It is too much for me, it would be very rash, to conclude, that he was mistaken in that. He has said, he intended to give her 1,000*l.* 5 per cents. He carries it on in a will, that cannot take effect as a will, but is a declaration under his hand. Then add the circumstance of what he calls it. There is nothing but the mere circumstance, that this, which he professes to be a plan of a will proposed to be drawn out, contains legatory words of present gift. He entitles it "A Plan designed for the last will and testament of William Mathews Storekeeper of His Majesty's Yard, Deptford." In his codicil he says, "I must not forget my good friends Miss Mary and Miss Charlotte Howell," &c. If that had been "Memorandum to give" it would speak strongly with the first sentence and the title. It is running very near to say, there is any distinction between "Memorandum" and "I must not forget."

Under all these circumstances, with this evidence, and, above all, the evidence of the paper itself, I should have no difficulty, sitting, as I have sat in a Court of Law, to put it so to the jury, that I should expect a verdict, that he had not devised; that it was no will, but only a project of a will, not a complete definite

MATHEWS v. WARNER.

rule and law for settling his fortune. It is not, it cannot, be denied, the argument presses so strong, that upon the perusal of this paper the natural conclusion is, that it was his intention to make a more formal paper than this. That inference cannot possibly be avoided. Then *ex hypothesi* this paper at the time he subscribed it was not the law, the testament. When then, at

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what period, did the *voluntas testandi* *exist in his mind *quoad* this instrument? If it is admitted, as it must be, that when he subscribed his name, he was looking to some future act, the decision, that this is his will, would destroy the most general maxim, I know of, "*voluntas testatoris ambulatoria est usque ad mortem.*" No man can answer the question, at what time that intention existed in his mind. I know, there was a period, when a contrary intention existed. He has given that evidence under his own hand by the paper of 1789.

Under all these circumstances I should have felt myself obliged, as an act of duty, strongly to press upon the consideration of the jury the utter impossibility upon the fair result of the evidence of making the supposition, that this was the will, and I must have added another circumstance, that it was his last will. The manner in which it was kept, with so little attention, the place, where it was found, these circumstances are always of great consideration.

But though that is the bias of my mind, I am very far from saying, it may not be a necessary conclusion in the Court, which is to decide by other maxims than we are acquainted with here, that this will may be established: but I wish the point, after it has been well canvassed and considered, to be felt as a point of great weight and importance; and if such things are to be established as wills, it loudly requires the interference of the legislature to prevent such a latitude in that respect, as makes the disposing of all a man's fortune the most slight and trivial act, attended with much less of form, solemnity, and precision, than any act he could do with regard to any part of his property during his life.

I shall therefore certify, that it is proper, that this Commission should be granted.

1799.
Nov. 20.
Serjeants' Inn Hall.
MATHEWS
v.
WARNER.

[The Commission of Review was consequently held on this date in Serjeants' Inn Hall, by the Bishop of London, Lord Kenyon, L. C. B. Macdonald, Sir William Scott (Judge of the Court of Admiralty), Rooke and Lawrence, Justices, Doctors Arnold and Robinson.]

[5 Ves. 23]

After the *Advocate-General*, the *Solicitor-General*, and *Mr. Richards*, had been heard in support of the testamentary paper, dated *the 2nd and 6th of October, 1785, the Commissioners of Review without hearing the counsel on the other side reversed the sentence as well of the Court of Delegates as also of the Judge of the Prerogative Court of Canterbury appealed from to the said Court of Delegates; pronounced against the force and effect of the pretended last will and testament and codicil of William Mathews, the deceased in this cause, bearing date the 2nd and 6th days of October, 1785; and that the said deceased is dead intestate; and directed the costs on both sides to be paid out of the estate of the said deceased.

[*5 Ves. 24]

HARRISON *v.* ROWLEY.†

(4 Vesey, 212—216.)

1798.
June 29.
Nov. 8.
Rolls Court.
ARDEN, M.R
[212]

An executor, who died before probate, was held entitled to a legacy given for his care and loss of time in the execution of the trusts of the will by having concurred with the other executors in directions for the funeral and in paying some small sums on that occasion.

MARY ALSAGER, by her will dated the 20th of June, 1792, devised divers real estates, and gave the principal part of her personal estate, to her executors and trustees upon the trusts expressed in her will, for the benefit of her sister Judith Alsager; and in case she should not dispose thereof, the testatrix made a general disposition in favour of other relations.

She gave and bequeathed to her said executors and trustees the sum of 100*l.* each for their care and loss of time in the execution of the trusts reposed in them, together with all reasonable expenses, when they should be called from home on account

† *Lewis* v. *Mathews* (1869) L. R. 8 Eq. 277, 281, 38 L. J. Ch. 510.

HARRISON v. ROWLEY.

thereof: and she appointed John Ford, Thomas Rowley, and Jonathan Wilson, joint executors of her said will and trustees for the several purposes therein mentioned.

Judith Alsager, sister of Mary Alsager, made her will, bearing the same date, by which after devising divers real estates and giving the principal part of her personal estate to her executors and trustees upon similar trusts for the benefit of her sister Mary Alsager, with a disposition, in case she should not dispose thereof, in favour of the same persons as expressed in the will of her said sister, she gave to her said executors and trustees legacies of 100*l.* each, together with their reasonable expenses, exactly according to the will of her sister; and she appointed the same three persons executors and trustees.

Judith Alsager died on the 21st of February, 1795; and was buried on the 27th of the same month.

[213] Mary Alsager died on the 23rd of March, 1795; and was buried on the 27th of the same month. She made no farther disposition of her property.

John Ford, the executor, died on the 16th of April, 1795.

The wills of Judith and Mary Alsager were proved on the 27th of June, 1795, by the surviving executors.

The bill was filed by the executors of John Ford against the surviving executors of Mary and Judith Alsager, claiming the said legacies of 100*l.* each.

The defendants by their answer stated, that they did not know, that John Ford acted in the trusts of the said wills of the said Mary Alsager and Judith Alsager further or otherwise than that the defendants went to his house, he being unwell, and there settled the orders given respecting the funeral of the testatrix Mary Alsager. They farther stated, that the residuary legatees of Mary and Judith Alsager disputed the right of the plaintiffs to the said legacies on the ground of John Ford not having taken probate of the wills of the said testatrixes, or entitled himself to the said legacies.

In support of the bill Thomas Heron Ravenscroft deposed, that John Ford did act in the trusts of the said wills of Mary and Judith Alsager, particularly in directing the deponent to pay on the 1st of April, 1795, the sum of 1*l.* 14*s.* 4*d.*, being the fees on

the burial of Mary Alsager, and Judith Alsager, and also on the same day to pay 4*l.* 6*s.* for making their coffins, and also on the same day to pay 1*l.* 19*s.* for opening the vault of the said Mary and Judith Alsager, and closing the same again; and the deponent paid the said several sums in pursuance of the said directions received by him from John Ford.

The receipts for these sums, dated the 1st of April, 1795, were produced in evidence; and they expressed, that the said sums were received from John Ford, esq. one of the executors and trustees of the late Mrs. Alsager.

When the cause first came on, the MASTER OF THE ROLLS directed it to stand over, in order to have the dates ascertained.

Mr. Graham and *Mr. Pemberton*, for the plaintiffs: [214]

It is certainly true, that where a legacy is given to a trustee expressly for care and pains, if he totally omits executing the trust, he is not entitled to the legacy: *Humberston* v. *Humberston*, 1 P. Will. 333, but a very small matter is sufficient. This person clearly accepted the trust; and made himself liable as *executor de son tort*. The only reason for refusing a legacy of this sort is, where the executor by his own laches has not entitled himself. Here appears a disposition to do everything, that was required of him. The defendants did not prove these wills till above two months after the death of their co-executor. Where is the line to be drawn, as to what acts will be sufficient to entitle an executor to his legacy? The defendants admit, they went to the house of Ford, he being unwell, and there settled the orders as to the funeral of Mary Alsager, the survivor of the testatrixes.

Mr. Lloyd and *Mr. Hall*, for the defendants:

These legacies are not given to the executors out of favour, but merely in consideration of their care and trouble in the execution of the trusts. If this executor had died the next day, it would have been impossible to contend, that he could be entitled. Some substantial act is necessary to shew, he meant to act, and did take steps for that purpose. He should have done something by way of taking possession of the estate, or some act as executor.

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That perhaps would have done, though probate was not taken out. Will any single act do: as on the night of the death ordering the bell to be tolled? Will an order given to another person by the executor to pay a single sum of money entitle him to a legacy given to him for his care and loss of time? Perhaps from its being given him in the character of executor it may be necessary, that he should have proved the will. It has been frequently said, that an executor cannot be entitled to a legacy without proving the will. That probably may be relaxed; and some acts may be considered equivalent to probate: but without some act of dealing under the will or probate he cannot be entitled. Paying for the funeral is an equivocal act. It is an act of charity, independent of the duty of an executor. It is not such an act as would compel him to administer the effects. An intention on the part of the executor would not do, unless he manifested it so as to make himself liable to be compelled to act: *Read* v. *Devaynes*, 3 Bro. C. C. 95. In *Abbot* v. *Massie* (3 Ves. 148), the * LORD CHANCELLOR holding, that an executor, who refused to act, could not take a legacy given to him as executor, gives the reason expressly, because he did not prove the will. In 4 Burn's Ec. Law, 198, 5th edit. there is a great deal of learning upon this subject; and the acts of charity are stated, that would not make a man compellable to act: as burying the deceased, taking care of his goods for safe custody, &c.

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Mr. Graham, in reply:

Suppose, he had acted for two years, but there had been some dispute about the probate, and they had gone to the Delegates, before they could obtain it: it would have related. All the legal rights vest by the death of the party. These persons having died in opulence, he could not mean to bury them as an act of charity. He does it in consultation with the other executors. In the two cases cited the executor manifested an intention not to act. This executor has shewn an intention to act: but he was prevented by the act of God. It is impossible to draw a line. Where the executor has shown a fair, unequivocal intention to go as far as he can, and is not prevented by his own fault or neglect, there is nothing to deprive him of his legacy. The principle is,

that there must be positive evidence of his declining to act in the trust.

MASTER OF THE ROLLS:

Any farther inquiry would lead to an expense more than the amount of the legacies.

The only question is, whether this executor has demonstrably shewn his intention to act in the execution of the trust, for which he with two other persons was to receive these legacies. It is most clear, they were not given to him as a mark of personal regard merely, but as a reward for taking upon him the execution of the trusts. First, is there any evidence, that he understood and knew, he had such a trust imposed upon him, and the terms, upon which it was to be taken? I will not determine, that if he had died at a distance without knowing, that he was appointed executor, or manifesting any intention to take upon him the trust, as if he had died at a distance, before the information reached him, he would be entitled. I will not decide that one way or other. But that is not the case here. This executor certainly did not die without knowing of this trust: on the contrary the two other executors, the defendants, went to him, and consulted with him respecting *the funeral of the survivor [*216] of these two ladies as least; (it does not appear by whose directions the other was buried;) and he concurred in giving the directions. Is not that an act notifying his intention to accept the trust? I must suppose, they informed him of the will, the trust imposed upon them, and the reward. With this knowledge he concurred in those directions. It is true, I admit, that if there was no executor, giving directions for the funeral is only an act of charity, and will not make a man executor. God forbid, it should; for then the deceased could not be buried by any one from the apprehension of being involved as executor. But this person did not concur in the directions for the funeral as an act of charity. There were two other executors. The deceased would have been buried, whether he concurred, or not. He also concurred in paying certain sums for the burial fees, for making the coffins, and opening the vault, the consequences of those directions.

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Then, is there any laches in not proving the will? As to the two cases cited, nothing is so clear, as that if a legacy is given to a man as executor, whether expressed to be for care and pains, or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor. If there is any circumstance to shew, he was backward in undertaking the trust reposed in him, he shall not have it. But this executor did as much as the defendants; for they did not prove the will for a considerable time. He did as much as any man could do in shewing, that he meant to undertake the trust. His death, before he executed it, cannot possibly defeat him. Therefore upon the evidence, and the rules, that have been laid down, I am of opinion, he has acted as far as he could, and was entitled.

Declare the plaintiffs entitled to the legacies of 100*l*. and 100*l*. given to John Ford by these wills; and let them be paid with costs out of the assets.

THELLUSSON *v.* WOODFORD.
WOODFORD *v.* THELLUSSON.

(4 Vesey, 227—343.)

1798.
Dec. 5, 6, 7, 10, 11.

1799.
April 20.

LOUGHBOROUGH, L.C.

[227]

Devise of real estates of the annual value of near 5,000*l.*, and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000*l.* to trustees and their heirs, &c., upon trust during the lives of the testator's sons, A., B. and C., and of his grandson D., and of such other sons as A. now has or may have, and of such issue as D. may have, and of such issue as any other sons of A. may have, and of such sons as B. and C. may have, and of such issue as such sons may have as shall be living at his decease or born in due time afterwards, and during the life of the survivor to receive the rents and profits, and from time to time to invest the same and the produce of timber, &c., in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited, of A. successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B. and C., as tenants in common in tail male in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail male; remainder to the trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed, that the trustees should stand seised upon the failure of male lineal descendants of A., B. and C. as aforesaid upon trust to sell and pay the produce to his Majesty, his heirs and successors, to the use of the sinking fund; the accumulation, till the purchases or sales can take place, to go to the same purpose; with a direction, that all the persons becoming entitled shall use the surname of the testator only. The trusts of the will were established.

[This decree was affirmed in the House of Lords upon appeal in 1805 (*Thellusson* v. *Woodford*, 11 Ves. 112), and the case as reported upon such appeal will be included in a later volume of the Revised Reports.]

1798.
Dec. 14.

LOUGH-BOROUGH, L.C.

[357]

LORD DILLON *v.* ALVARES.†

(4 Vesey, 357—359.)

Plea of a suit depending in the Court of Chancery in Ireland for the same matter overruled.

THE bill stated, that in 1768, the plaintiff being under the age of twenty-three borrowed from the defendant the sum of 3,200*l.* upon securing to him a rent-charge of 1,000*l.* per annum during the plaintiff's life, payable out of an estate in Ireland, to which the plaintiff was entitled in remainder after his father's death: the payment to commence upon the death of his father or of his uncle George, Earl of Litchfield, which should first happen.

The plaintiff accordingly granted such annuity by deed, dated the 17th of February, 1768; and he also gave a bond in the penalty of 10,000*l.* and warrant to confess judgment.

The plaintiff afterwards borrowed 600*l.* more from the defendant; for which he executed a bond and warrant, dated
[*358] the 1st *of August, 1768, securing to the defendant an annuity of 100*l.* during the plaintiff's life, to commence from the date of the bond.

In 1772 the latter annuity being in arrear, and the defendant pressing, that security was changed into a grant of a rent-charge of 320*l.* per annum during the plaintiff's life, payable out of the said estate in Ireland, to commence upon the death of the plaintiff's said father or uncle, which should first happen. The deed granting that rent-charge and a bond in the penalty of 4,000*l.* were executed upon the 25th of January, 1772, in consideration of the said sum of 600*l.*, the exchange, valued at 100*l.* an arrear of 186*l.* 1*s.* 8*d.* upon the former annuity, and the sum of 113*l.* 18*s.* 4*d.* in cash.

Four months after that transaction, in 1772, George, Earl of Litchfield, died; leaving his estate to his uncle, the late Lord Litchfield and his issue in strict settlement; remainder to the plaintiff and his issue in strict settlement. Upon the death of the late Lord Litchfield in 1776 the plaintiff became seised of that estate; and upon that occasion a meeting was called of his

† See *McHenry* v. *Lewis* (1882) 22 Ch. D. 397, 400, 52 L. J. Ch. 325.

creditors; and his affairs were settled by their giving up the securities, they had, and accepting the money fairly advanced, with interest at the rate of 5*l.* per cent. The defendant refused to do so; notwithstanding such offer was repeatedly made. The plaintiff's father died in 1787. The defendant commenced proceedings against the plaintiffs in the Courts in Ireland upon the securities in his possession; and threatens to commence proceedings against him in this kingdom.

The bill prayed, that the several deeds of annuity and bonds executed by the plaintiff might be delivered up to be cancelled upon discharging what might appear to be fairly due to the defendant; that an account might be taken: and that the defendant might be restrained by injunction from proceeding at law.

The defendant pleaded, that before the bill was exhibited, viz. in or before Easter Term, 1796, the plaintiff did exhibit his bill in the Court of Chancery in Ireland; that the said bill was for the same matter, and to the same effect, and for the same relief and purpose, *as the present bill; and the defendant put in an answer; and the plaintiff replied thereto; and the said suit is depending in the Court of Chancery in Ireland, and undetermined. Therefore the defendant pleaded the same in bar. [*359]

Attorney-General, in support of the plea, said, it ought to have been referred to the Master to look into both suits; and by this mode the defendant may be harassed in every country.

Solicitor-General and *Mr. Mansfield*, for the plaintiff, cited *Foster* v. *Vassall*, 3 Atk. 587; and observed, it was impossible, that the injunction in Ireland could have any effect in this country.

LORD CHANCELLOR:

Can I send it to the Master to look into a bill in Ireland?

Where a man has an estate in England and another in Ireland the suit must go on in both countries.

The plea was overruled.

1798.
Dec. 11, 20.

Rolls Court.
ARDEN, M.R.
[362]

LEE *v.* BROWN.

(4 Vesey, 362—369.)

Legacy at twenty-one, the interest for maintenance, not satisfied by advancements during minority for the infant's benefit; nor by a legacy larger, but of a different nature, received under the will of the executor: there being no positive relinquishment; though no demand for ten years.

MARTHA PYLE by her will, dated the 25th of January, 1774, gave to her brothers William and Edward Brown the sum of 100*l.*, upon trust to place the same out at interest during the minority of her great-nephew John Lee, and to apply the interest and produce thereof for and towards the maintenance and education of her said great-nephew; and, when he should attain the age of 21, then to pay or otherwise transfer the said sum of 100*l.* to him: but in case he should die, before his said legacy should become payable, she gave his said legacy among his brothers and sisters equally; and she appointed her brothers William and Edward Brown executors.

After the death of the testatrix, which happened in 1774, both the executors proved the will; and William Brown expended much more than the interest of John Lee's legacy by maintaining and educating him at school. In 1781, William Brown put John Lee apprentice to a druggist at Bristol; giving with him a fee of 100 guineas.

William Brown died in 1782 without issue; having by his will, dated the 4th of March in that year, directing his just debts to be paid, given a legacy to John Lee in the following words:

"I give to my great-nephew John Lee 200*l.*, which I direct shall be paid to him when he attains the age of 22 years:"

He also gave legacies to the brothers and sisters of John Lee; and he appointed his brother Edward Brown executor.

John Lee in 1786 attained the age of 21; and in 1787 having attained the age of 22, he gave a power of attorney to —— Orchard, reciting the legacy of 200*l.* under the will of William Brown, and empowering Orchard to demand and receive for him all legacies left or to be left to him as well as other monies and effects due to him. Under that power of attorney Orchard applied to Edward Brown, as executor of his brother, for

payment of the legacy of 200*l.*; which *Edward Brown paid to him on the 9th of March, 1787, for the use of John Lee; and Orchard gave a receipt of that date for the same. Upon that occasion no notice was taken of the legacy of 100*l.* under the will of Martha Pyle; nor was any demand of that legacy made, till this bill was filed in 1797 by John Lee, who was then in the situation of a stage-coachman, against his uncle Edward Brown; praying that the said legacy of 100*l.* might be paid to him with interest. [*363]

The defendant by his answer insisted, that the legacy of 100*l.* given to the plaintiff by the will of Martha Pyle was satisfied. The answer farther stated, that during the apprenticeship of the plaintiff William Brown paid him eighteen guineas, besides declaring, that he would afterwards give him the sum of 200*l.* to set him up in business. The defendant admitted assets.

There was evidence of declarations by William Brown, that what he had advanced for the plaintiff was advanced as the legacy due to him.

Mr. Short, for the plaintiff:

With respect to the objection from the apprentice-fee, the legacy of 100*l.* to the plaintiff being contingent upon his attaining the age of 21, the defendant was guilty of a breach of trust by such an application of it. The legatee was then only sixteen.

As to the legacy of 200*l.*, wherever a legacy has been held a satisfaction, there has been either evidence or a strong presumption of that intention. In this case the presumption is against it. The promise stated in the answer to give the plaintiff 200*l.* to set him up in business totally excludes the idea of satisfaction. There is nothing in the will, from which an intention to satisfy can be presumed. The testator was a man of property, and had no children of his own; therefore the plaintiff was the natural object of his bounty. The debt was due by the testator in the character of executor: the legacy was given by him in his own character. The two legacies are payable at different times; the *one contingent, the other absolute. In that case there can be no satisfaction: *Crompton* v. *Sale*, 2 P. Will. 553. He directs his debts to be paid. That direction has in many cases been much [*364]

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relied on. Suppose, the plaintiff had died under the age of 21. In that event the legacy of 100*l.* is given over.

Mr. Graham and *Mr. King*, for the defendant:

Such a suit as this is not to be countenanced. The plaintiff being an orphan, his uncle took him under his care, placed him at school, paid for his education, for which no other fund existed than the interest of this legacy of 100*l.*, and maintained him during his very long infancy, and put him out apprentice, paying upon that occasion 100 guineas. I do not contend upon the point of satisfaction: but upon all the circumstances and after acquiescence for ten years the Court will presume any thing against so unwarrantable a claim. *Dagley* v. *Tolferry*, 1 Eq. Ca. Ab. 300, comes very near this. Lord COWPER was so much against the claim as to order the deposit to be divided. In *Philips* v. *Paget*, 2 Atk. 81, Lord HARDWICKE thinks the rule, as it is laid down in Peere Williams, is carried too far; and that the case must have had other circumstances. The report in Equity Cases Abridged is therefore most probably correct. The single circumstance, that determined Lord COWPER to have the money paid over again, was, that the father had told the son, with whom he was engaged in trade, that he would receive and account for it.

The power of attorney was given upon the plaintiff's insolvency. He did not then choose to mention this legacy; but now brings forward this claim with a view to put the money in his own pocket to the prejudice of his creditors. The ground of the defence is a presumed relinquishment. Upon the circumstances the bill ought to be dismissed with costs.

Reply:

[*365] * * * There is no suggestion, *that the plaintiff at that time knew any thing of this legacy, and relinquished it. It appears, from the moment of his attaining the age of 21 he was in distress. That alone sufficiently accounts for the delay in filing this bill. There is no such bar in this Court as nine or ten years. William Brown by his will made ample provision for the brothers and sisters of the plaintiff; and the defendant also takes considerable property under that will. * *

MASTER OF THE ROLLS:

Why did not the defendant take a release for the one legacy as well as the other, or come to some settlement; especially, when he saw the letter of attorney?

The question is, whether the plaintiff, after he came of age, did any act, shewing, that he was satisfied. It depends entirely upon circumstances. It is extremely material for the defendant to prove some sort of acquiescence. They must have had some meeting upon it, I should think; and I am inclined to have an inquiry: and both parties to be examined upon interrogatories. This is not the case of a parent. The Court is very tender of binding children by payments to them, to their parents, or for their use, during their minority. It is plain, William Brown paid more than the legacy. All that would not do, if the plaintiff, when he came of age, did not think conscientiously, that his uncle had discharged the legacy, and did not mean to relinquish it. It lies upon the defendant to prove, that the plaintiff did mean to accept what had been done as payment and satisfaction. It is extraordinary, and in opposition to that construction, that if that was the case, the uncle should be so careless as not to get the plaintiff to release it, when the other legacy was paid. I think the bill ungracious: but I must judge according to the law, whether the plaintiff has accepted this as a satisfaction of his legacy.

MASTER OF THE ROLLS: *Dec.* 13.

I am afraid, this cause is not ripe for judgment without more inquiry. It is proved, that William Brown declared, that what he had advanced was advanced by him as the legacy of 100*l.* due to the plaintiff; and he supposed himself competent to apply that legacy for the benefit of the plaintiff during his minority instead of paying it to him at the *age of twenty-one; in which most [*366] unquestionably he was mistaken. The plaintiff having attained the age of twenty-one had a right then, if he thought fit, to call for the payment of that legacy, notwithstanding the money ignorantly advanced for him by his uncle. The transaction, that took place with respect to the legacy of 200*l.* given by William Brown to the plaintiff cannot be accounted for, except upon the idea, that when he received that legacy by his attorney,

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he had entirely relinquished any demand in respect of the legacy of 100*l.* upon the estate either of Martha Pyle or William Brown. At the same time it is very extraordinary, that the defendant, when he paid the other legacy should not take any notice of or desire a discharge for that legacy of 100*l.* Ten years after that transaction the bill is filed; insisting, that the legacy of 100*l.* was never satisfied; and it is admitted, that it never has been satisfied except by the payments made by William Brown during the minority of the plaintiff, and the legacy of 200*l.* paid by his executor: but it is insisted, that all the circumstances and the length of time, that has elapsed, are sufficient to rebut the demand; proving, that the plaintiff had accepted the payments made as a satisfaction.

I should be very unwilling in a case like this to hold, that any payment for the benefit of an infant during his minority was a discharge of a legacy to him at the age of twenty-one: but if he thought fit with his eyes open and fully aware of his right to relinquish it, certainly it was competent to him to let those payments operate as a discharge. If by any evidence it can be proved, that he considered them as a satisfaction, he shall not now claim the legacy: but after the cases, that have been decided, I must be extremely cautious in holding payments for the benefit of an infant to be a satisfaction of a legacy to him at the age of twenty-one.

Dagley v. *Tolferry* and *Philips* v. *Paget* prove only, that this Court is extremely tender in binding infants by payments made during their minority; and the case of payment to the father, where after fifteen years the executor was compelled to pay again what was paid to the father, shews, how jealous the Court is upon
[*367] that point. This case differs in some respects. The *unfortunate circumstance is, that the sum is so small, that an inquiry will be very inconvenient: but if a man brings a bill under these circumstances, he cannot complain, where it is necessary, that all the circumstances should be known; and I do not know, that I can do justice without an inquiry; for the whole depends upon circumstances. It may or may not have been accepted by the plaintiff. The evidence is not sufficient to shew, that it was. In *Philips* v. *Paget* Lord HARDWICKE was so struck with the hard-

ship, that he almost drove the parties into something of a compromise. I must take care, that the executor is not injured; and if the plaintiff was satisfied, and considered himself satisfied, I will not let him now raise this claim. There is no presumption of satisfaction in any other way. The period of ten years, on which so much reliance is placed, does not afford any pretence of any other payment. It is plain, the plaintiff got only the legacy of 200*l.* and the sums advanced during his minority by the mistake of his other uncle. The *onus* lies upon the executor to prove, that the plaintiff considered himself satisfied; and acquiesced with his eyes open, knowing, that he might have demanded this legacy.

The counsel for the plaintiff objecting to an inquiry on account of the expense, the MASTER OF THE ROLLS said, he would give judgment in a few days.

MASTER OF THE ROLLS:

Dec. 20.

I have looked into these cases. I observe in *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186, in which my decree was affirmed by Lord THURLOW, I took notice, that in *Dagley* v. *Tolferry* the MASTER OF THE ROLLS gave no interest: but he gave costs; and in *Philips* v. *Paget* Lord HARDWICKE so much discountenanced the bill, that he in some degree forced the parties into a compromise. This case is very different from *Dagley* v. *Tolferry* in this circumstance; that these payments were not made to the father of the legatee; but were made absolutely for his own benefit. Consequently any thing affirming it, after he was of age, would be sufficient. There is nothing to fix him here but his own consciousness, that it ought to be affirmed. This is a very ungracious demand; and it will be with great reluctance that I shall give the plaintiff anything: but I think, I cannot dismiss his bill. I do not feel, that since he came of age he has done anything to *affirm this. If I am to give judgment, I have [*368] no difficulty in giving the 100*l.* with interest from the time of filing the bill: but I will give no costs on either side.

There was no power in the executors of Martha Pyle to apply more than the interest of this legacy for the maintenance of the legatee. They were not at liberty under the trust reposed in

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them to advance any part of the capital; though it would have been ever so much for his benefit. In 1786, when the plaintiff attained the age of twenty-one, if with his eyes open, upon full consideration of all, that had been done for him during his minority, he had by any act admitted, that the advancement had been for his benefit, and he was willing to accept it as a satisfaction, it was unquestionably competent to him to do so: but the fact is, that coming of age after the death of his uncle he never made any demand: but in 1787, being in some distress I suppose, for some reason, whether it was necessary for him to keep out of the way, so that he could not personally demand it, does not appear, he executed a letter of attorney to enable another person to receive all legacies and other monies due to him. Under this letter of attorney that person received the legacy of 200*l.* bequeathed to the plaintiff by his uncle, and no more; and he gave a receipt for that sum and for nothing else; and no notice was taken of the legacy of 100*l.* due under the will of Martha Pyle. The plaintiff has now rested for ten years; and, whether from the increasing distress of his circumstances or for what other reason I do not know, he now brings forward this claim; insisting, that this legacy of 100*l.* was never satisfied. It certainly was never satisfied by the legacy of 200*l.* That was never accepted as a satisfaction.

The question then is, whether this Court ought to declare the plaintiff still entitled to this legacy so neglected to be called for by him, when he ought to have called for it. *Dagley* v. *Tolferry* was much relied on in *Cooper* v. *Thornton*; which went off upon a different ground; Lord THURLOW being of the same opinion with me, that under the will the payment to the father was good. Upon that occasion I looked much into *Dagley* v. *Tolferry*; which was determined by Sir JOHN TREVOR; whose decree was upon an

[*369] *appeal affirmed by Lord COWPER upon this ground, that payments to infants during their minority ought to be discountenanced by this Court; that an executor at his own peril makes advances; of which the infant may complain, when he comes of age.

It certainly was not competent under this trust to the executor, nor could he, if he had applied, have obtained permission from

this Court, to advance any part of the capital of the legacy in putting the child out in the world; for if it had been such a case, that the Court would have authorized the act, that was done, I desire to be understood, that it would be considered as properly done; for that principle has been established since *Andrews* v. *Partington*, that if an executor does without application what the Court would have approved, he shall not be called to account, and forced to undo that, merely because it was done without application. The uncle, who died, put himself so far *in loco parentis*, that the infant has a right to say, he does not know his uncle did not mean to make him a present of that money. The question is, whether he meant to take it as a satisfaction, to affirm the acts of the uncle; and I am of opinion, that what the plaintiff has done is not complete evidence of his having so assented; and therefore; though I am dissatisfied with the demand, and think, that if motives of honour and conscience had weighed with the plaintiff, he would not have made it, I cannot hold it satisfied.

As to the costs, in *Dagley* v. *Tolferry* the infant lost the benefit of his legacy: in this case he gets the benefit of it. Under the circumstances I cannot give interest or costs.

Decree, that the defendant shall pay the plaintiff the legacy of 100*l*. with interest from the time of filing the bill at the rate of 4 per cent. but I give no costs on either side.

SPENCER *v.* BOYES.

(4 Vesey, 370—371.)

1798.
Dec. 11, 21.

Rolls Court.
ARDEN, M.R.
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Copyhold lands mortgaged in fee by lease and release as freehold: the customary heir is bound by a covenant for farther assurance: but during his infancy the Court refused to foreclose; and would go no farther than directing the account, and that in default of payment the plaintiffs should be let into possession, and hold and enjoy, till the heir should attain twenty-one, at which time he should surrender; and a day was given to shew cause against the decree.

BY indentures of lease and release certain premises were conveyed to —— Spencer, his heirs and assigns, by way of mortgage by Rachael Boyes and Edward Boyes, her son; and the

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said indentures contained covenants by Rachael and Edward Boyes, that they were seised in fee, and had a right to convey in fee, and for farther assurance.

The mortgaged premises were in fact copyhold estate; which according to the custom of the manor descended to the youngest son. At the time the mortgage took place Rachael Boyes had been admitted to the customary estate: and Edward Boyes was customary heir expectant on the determination of her estate. Edward Boyes died in the life of his mother, having never been admitted, or had any estate in possession. He left two sons, Edward and Benjamin.

The bill was filed by the executors of the mortgagee against Benjamin Boyes, the customary heir, an infant; praying, that he may be decreed to surrender the estate to the use of the plaintiffs; and that an account may be taken of what is due to them for principal, interest, and costs; and that in default of payment the defendant may be foreclosed.

Mr. Graham, and *Mr. King*, for the plaintiffs, pressed for a decree for a surrender and a foreclosure at once.

MASTER OF THE ROLLS:

I am clearly of opinion, that this covenant is a contract for valuable consideration affecting the land, and will affect the heir: but can I direct this infant heir to surrender, while he is an infant, and accompany that decree for a surrender with a decree for foreclosure? The plaintiffs must first get the estate conveyed to them, before I can direct any account against him. He is not a mortgagor yet. They will find it very difficult to foreclose him, till he comes of age. They come against the infant heir, first to get the legal estate, and then to foreclose. It would be plain against an adult: but as against an infant heir I have great doubt.

[371] It is a case that ought to be well attended to as a precedent. I will consider of it.

Dec. 21. *Mr. Graham*, for the plaintiff, gave up the point as to the foreclosure; and desired a decree, declaring, that the covenant

bound the land, and directing an account of what is due for principal, interest, and costs; and that a day should be appointed for payment; and that, if the money should not be paid, the plaintiffs shall be let into possession, and shall hold and enjoy till the infant comes of age.

MASTER OF THE ROLLS:

I may go so far against an infant: but no farther; and he must have a day to shew cause after he comes of age. Then you may go on with your foreclosure: but I will not give the two steps now. You come for a favour against an infant.

By the decree it was declared, that the covenant in the mortgage deed bound the land descended to the defendant: and it was referred to the Master to take an account of what was due to the plaintiffs for principal and interest upon the mortgage, and to tax their costs of this suit: and upon the defendant's paying to the plaintiffs what shall be reported due for principal, interest and costs, within six months after the Master shall have made his report, at such time and place as the Master shall appoint, the plaintiffs were directed to re-convey such mortgaged premises to the defendant clear of all incumbrances, and to deliver up upon oath all deeds, papers, &c. relating thereto: but in default of the defendant's paying to the plaintiffs what shall be reported due to them for principal, interest and costs, as aforesaid, by the time aforesaid, the plaintiffs were to be let into possession of the said mortgaged premises, and to hold and enjoy the same as against the defendant, until he shall attain the age of twenty-one years; and upon his attaining his age of twenty-one years, the defendant was directed to surrender the said mortgaged premises to the plaintiffs upon the trusts of the said indenture; and this decree was declared to be binding upon the said defendant, unless upon being served with a subpœna to shew cause he shall within six months after he shall attain the age of twenty-one shew cause to the contrary.

1798.
Dec. 22, 24.

LOUGH-BOROUGH, L.C.

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WALKER, EX PARTE.*

(4 Vesey, 373—385.)

Cross paper between two houses; both of which become bankrupt: as between the two estates no proof can be made in respect of the bad paper or the excess of damage eventually sustained on that account.

THE houses of Caldwell & Co. and of George Browne and Henry Browne were considerable houses of trade at Liverpool: the former acting as bankers; the latter being general merchants. On the 23rd of March, 1793, a commission of bankruptcy issued against Caldwell & Co.; under which they were declared bankrupts; and in the same month the house of Browne also was declared bankrupt. The assignees of Caldwell & Co. claimed to prove and receive dividends to a very large amount under the commission against the house of Browne. This produced a petition by the assignees of Caldwell & Co. to the Lord Chancellor; upon which by an order, dated the 13th of May, 1797, his Lordship ordered, that it should be referred to Robert Richmond, Esq., William Roscoe, Esq. and Joshua Lace, Esq., all of Liverpool, to take an account of all dealings and transactions between the house of Caldwell & Co. and the house of Browne before the date of the commissions issued against them; and to inquire into and state the cash account and also the bill account between the said two houses, as they respectively stood at the time of their bankruptcy, and as they might stand at the time of making such statement; and to state any other particulars, they might think material; and further directions were reserved.

Upon the certificate made under that order the dealings and transactions between these houses and the proceedings under the respective commissions arising out of their connection appeared to be in substance as follows.

Charles Caldwell and Thomas Smyth for several years previous to their bankruptcy were resident in Liverpool; and John Forbes and Daniel Gregory were resident in London; where they carried on the business of merchants under the firm of

* *Macredie, Ex parte* (1873) L. R. 8 Ch. 535, 42 L. J. Bky. 90; *Cama, Ex parte* (1874) L. R. 9 Ch. 686, 43 L. J. Bky. 683.

WALKER, Ex parte.

Burton, Forbes, & Gregory. In the year 1774 Caldwell and Smyth entered into partnership with Forbes and Gregory in the business of bankers at Liverpool, under the firm of Caldwell & Co.: but Forbes and Gregory continued to reside and carry on their business as merchants in London as a separate and distinct concern for their own use and benefit.

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Caldwell & Co. in the course of their business and for the purpose of carrying it on drew bills of exchange on Forbes and Gregory in London under the firm of Burton, Forbes, & Gregory; which were paid or negociated, and were usually accepted by Forbes and Gregory, and before their bankruptcy were paid, when they became due. To enable Forbes & Gregory to take up such bills, or to reimburse them for what they paid, Caldwell & Co. remitted bills of exchange received by them in the course of their business, which bills were placed to the credit of Caldwell & Co. in account with Forbes & Gregory. These negociations and transactions continued to the time of the bankruptcy of Forbes & Gregory.

Various transactions in business had for several years prior to the bankruptcy of Caldwell & Co. taken place between Caldwell & Co. and George Browne & Henry Browne; who carried on the business of merchants at Liverpool: in the course of which Caldwell & Co. paid or advanced considerable sums, as well in cash as in bills of exchange, to the house of Browne; the greater part of which bills were drawn by Caldwell & Co. on Forbes & Gregory. The house of Browne also paid to Caldwell & Co. from time to time cash and bills of exchange; and an account in the nature of a banking account was kept between Caldwell & Co. and the house of Browne; upon which interest was reciprocally paid and allowed, and a commission of 5*s.* for every 100*l.* was charged by Caldwell & Co. to the house of Browne; which is the usual charge made by bankers on such transactions in Liverpool. The account was settled at the end of every three months; and a balance stated, and carried forwards to the debit or credit of the respective parties, as the case might be. An account was settled between the two houses on the 28th of February, 1793: upon which a balance of 5,090*l.* 11*s.* 4*d.* appeared to be due from Caldwell & Co. to the house of Browne;

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which was carried forward to their credit. The accounts so settled consisted principally of bills to a large amount advanced by the respective parties to each other; which at the time of the last account were in a course of circulation; and many of the bills included in that account were not eventually paid. The dealing between the two houses still continued; and bills of exchange to a large amount were mutually paid or advanced: but no farther settlement took place prior to the bankruptcy of Caldwell & Co. which happened on the 18th of March, 1793.

[375] Upon the statement of the accounts, as they stood at the time of the bankruptcy of Caldwell & Co. the following result appeared:

The cash account was formed not only of the payments in cash, but also by selecting out of the bill account the payments made by each party by bills duly honoured.

The bill account consisted of the paper on both sides without regard to its solidity. Upon the 18th of March, 1793, the time of the bankruptcy of Caldwell & Co., bills to a very considerable amount were in a course of circulation, and unpaid.

On the cash account there was due from the house of Browne to Caldwell & Co. at the time of their bankruptcy the sum of 40,716*l.* 0*s.* 8*d.*

The bill account stood thus. Of the bills paid by the house of Browne to Caldwell & Co., as well before the 28th of February, 1793, the date of the last settled account, as in the interval between that day and the bankruptcy of Caldwell & Co. and for which the house of Browne had credit, bills to the amount of 305,149*l.* 19*s.* 10*d.* proved bad, and were dishonoured: but of those bad bills some, to the amount of 103,890*l.* 10*s.* 1*d.* had been remitted by Caldwell & Co. to Forbes & Gregory; and had been proved by their assignees under the commission against the house of Browne; and a dividend had been received on that proof by an order of the Lord Chancellor.

Of the bills paid by Caldwell & Co. to the house of Browne, and for which Caldwell & Co. had credit, bills to the amount of 204,910*l.* 5*s.* 1*d.* were dishonoured, and proved bad. Upon the amount of the bad bills the balance in favour of Caldwell & Co. amounted to 100,239*l.* 14*s.* 9*d.* This sum being added to the

cash balance of 40,716*l.* 0*s.* 8*d.* made the sum of 140,955*l.* 15*s.* 5*d.*

Of the bad bills paid by Caldwell & Co. to the house of Browne they negotiated to different persons part, to the amount of 196,589*l.* 6*s.* 4*d.* The residue of those bills, to the amount of 8,320*l.* 16*s.* 9*d.*, were retained by the house of Browne, or had been returned, and remained in the hands of their assignees.

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Of the bills so negotiated by the house of Browne, part, to the amount of 188,126*l.* 15*s.* 4*d.*, were drawn by Caldwell & Co. on Forbes & Gregory; and the remainder, amounting to the sum of 8,462*l.* 11*s.* 0*d.*, consisted of bills drawn by other persons, which had come to the hands of Caldwell & Co. in the course of their business, and were by them paid and indorsed to the house of Browne.

Of the bills for 188,126*l.* 15*s.* 4*d.*, drawn by Caldwell & Co. on Forbes & Gregory, they accepted to the amount of 141,499*l.* 7*s.* 2*d.*; and those acceptances were proved under the commission issued against them by the persons, to whom they were negotiated by the house of Browne; and a dividend of 2*s.* 6*d.* in the pound was on the 14th of April, 1796, ordered thereon; which dividend amounts to the sum of 17,687*l.* 8*s.* 4*d.* The residue of the said sum of 188,126*l.* 15*s.* 4*d.*, being 46,627*l.* 8*s.* 2*d.*, was not proved against the estate of Forbes & Gregory.

Of the bills paid by Caldwell & Co. to the house of Browne, and negotiated, the whole amount, viz. 196,589*l.* 6*s.* 4*d.* was proved or claimed under the commission against Caldwell & Co., except the sum of 1,166*l.* 13*s.* 1*d.*; the sum of 191,292*l.* 0*s.* 0*d.* having been proved; and two dividends, amounting in the whole to 3*s.* in the pound, and making the sum of 28,693*l.* 16*s.* 0*d.*, having been ordered upon such proofs; and the sum of 4,130*l.* 13*s.* 3*d.* having been claimed.

Of the bills paid by Caldwell & Co. to the house of Browne, and by them indorsed and negotiated, bills to the amount of 57,121*l.* 4*s.* 3*d.* were proved under the commission against the house of Browne.

Others of such bills, to the amount of 85,621*l.* 6*s.* 4*d.* were indorsed and negotiated by the house of Browne to persons, with whom they had at the time of their bankruptcy unliquidated

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accounts. The holders of these bills being creditors of the house of Browne to the amount of 46,414*l.* 2*s.* 8*d.* only, that sum only was proved against the estate of Browne, and the bills exhibited as securities.

Upon the said sums of 57,121*l.* 4*s.* 3*d.* and 46,414*l.* 2*s.* 8*d.* a dividend of 2*s.* 3*d.* in the pound, amounting in the whole to the [*377] *sum of 11,647*l.* 14*s.* 6*d.* was ordered under the commission against the house of Browne.

Others of the said bills so paid by Caldwell & Co. to the house of Browne and negotiated by them, to the amount of 22,710*l.* 17*s.* 8*d.* were claimed under the commission against that house; and the residue of the said bills for 196,589*l.* 6*s.* 4*d.*, amounting to the sum of 31,135*l.* 18*s.* 1*d.*, were neither proved nor claimed under that commission.

Of the bad and dishonoured bills advanced and paid by the house of Browne to Caldwell & Co., amounting to the sum of 305,149*l.* 19*s.* 10*d.*, part, to the amount of 178,294*l.* 8*s.* 0*d.*, were not negotiated, but remained in the hands of Caldwell & Co. at the time of their bankruptcy, and from that time were in the possession of their assignees. The residue of such bills, amounting to the sum of 126,855*l.* 11*s.* 10*d.*, were indorsed and negotiated by Caldwell & Co.: part, to the amount of 103,890*l.* 10*s.* 1*d.*, having been remitted and indorsed by them to Forbes & Gregory, and the residue amounting to the sum of 22,965*l.* 1*s.* 9*d.* were negotiated by Caldwell & Co. to divers persons in the course of their business in Liverpool.

The bills paid by the house of Browne to Caldwell & Co., and negotiated by them, amounting to the sum of 126,855*l.* 11*s.* 10*d.*, were drawn by the house of Browne upon several persons in London, Hamburgh, and Liverpool. Most of them were accepted; but the acceptors afterwards becoming insolvent, the holders received dividends from their respective estates. Part, to the amount of 17,580*l.* were not accepted, but were returned for non-payment; and a part thereof, to the amount of 12,800*l.* were returned to Forbes & Gregory, and composed a part of the said sum of 103,890*l.* 10*s.* 1*d.* remitted by Caldwell & Co. to Forbes & Gregory.

The assignees of Caldwell & Co. proved under the commission

against the house of Browne in respect of the cash balance between the parties the sum of 139,482*l.* 10*s.* 6*d.*; which was afterwards reduced with the assent of the assignees of Caldwell & Co. to 132,694*l.* 2*s.* 6*d.*; and the assignees by their affidavit in proof of that debt, among other securities held by them, as well for the cash balance as for the balance on the bill accounts between the *parties, stated the said bills so received from the [*378] house of Browne, amounting to 103,890*l.* 10*s.* 1*d.*, indorsed and remitted by Caldwell & Co. to Forbes & Gregory. But the assignees of Forbes & Gregory having since proved a debt of 100,744*l.* 12*s.* 10*d.* under the commission against the house of Browne in respect of the said bills, (the reduction in the amount arising by dividends received from other estates liable to the payment,) the Commissioners restrained the dividend, that would have become payable to the assignees of Caldwell & Co. in respect of the sum of 100,744*l.* 12*s.* 10*d.*; and ordered the assignees of the house of Browne to pay to the assignees of Caldwell & Co. a dividend on the sum of 26,999*l.* 12*s.* 5*d.* only, and to retain sufficient to make a like dividend on the sum of 100,744*l.* 12*s.* 10*d.*, when the right to it should be established by the assignees of Caldwell & Co.

No proof was made by the assignees of Forbes & Gregory under the commission against Caldwell & Co. in respect of the sum of 103,890*l.* 10*s.* 1*d.*; a compromise having taken place between the respective assignees by indenture, dated the 4th of January, 1796. But a dividend upon the said sum of 100,744*l.* 12*s.* 10*d.* was ordered by the commissioners under the commission against the house of Browne to be paid to the assignees of Forbes & Gregory under an order of the LORD CHANCELLOR, dated the 11th of April, 1796; which dividend, amounting to the sum of 11,333*l.* 15*s.* 4*d.*, being 2*s.* 3*d.* in the pound, was paid accordingly.

Of the residue of the bills paid by the house of Browne to Caldwell & Co., and by them negotiated, amounting to the sum of 22,965*l.* 1*s.* 9*d.*, a part, amounting to 19,632*l.* 2*s.* 2*d.*, were proved by the holders under the commission against the house of Browne; and a dividend of 2*s.* 3*d.* in the pound, amounting to the sum of 2,208*l.* 12*s.* 3*d.* was ordered thereon: but the residue

WALKER, Ex parte.

of those bills, amounting to 3,332*l.* 19*s.* 7*d.*, were not proved or claimed under that commission.

Of the said bills, amounting to the sum of 22,965*l.* 1*s.* 9*d.*, a part, amounting to the sum of 16,517*l.* 11*s.* 9*d.*, were proved under the commission against Caldwell & Co.; and two dividends were paid thereon, amounting to the sum of 2,477*l.* 12*s.* 6*d.*

The petition, which produced this certificate, stated the dealings between these houses and the proceedings under the

[*379] commissions *of bankruptcy; and suggested, as the result, that the estate of Caldwell & Co. had been much injured, and that of the house of Browne benefited, in the following particulars:

Of the bills advanced by Caldwell & Co. to the house of Browne, and negotiated by them, as to those drawn by other persons and indorsed by Caldwell & Co., they had paid or accounted for the value; and for those drawn on Forbes & Gregory by Caldwell & Co. they had made remittances; and the whole of those bills (with a few exceptions) were accepted by Forbes & Gregory, and had been proved under the commission against Caldwell & Co. and also under the commission against Forbes & Gregory; and dividends had been paid out of both estates: so that in effect the estate of Caldwell & Co. is injured to the amount of the dividends paid by both estates on those bills and the dividends paid on their indorsements on the other bills, as well as by dividends paid on Browne's bills, which Caldwell & Co. had issued and indorsed, except such dividends as may have been received by the proof against Browne's estate on their drafts negotiated by Caldwell & Co.

The bills advanced to Caldwell & Co. by the house of Browne and not negotiated were not negotiated at their request.

The dividends paid by the estate of Forbes & Gregory were charged or estimated in the arrangement of the accounts between the estates of Caldwell & Co. and Forbes & Gregory; and the estate of Caldwell & Co. is injured to the amount of the dividends paid by Forbes & Gregory.

Of the bills of Caldwell & Co. deposited by the house of Browne as securities for debts due by them the whole amount was proved against the estate of Caldwell & Co.: but the real balance owing by the house of Browne was proved against their estate, and the

bills exhibited as securities for those debts only; and in one instance, as the dividend on the estate of Caldwell & Co. has paid the whole demand, the proof against the estate of Browne, if made, will be expunged. In which respect also the estate of Caldwell & Co. is injured.

All the bills, which the house of Browne received from Caldwell & Co. were discountable, and by far the greater amount *thereof [*380] were issued for the full value received by the house of Browne; and the estate of Caldwell & Co. had no value for the said bills except the bad bills, received by them from the house of Browne; viz. the bills negotiated, and the bills not negotiated, but held over at the request of the drawers.

The petition farther stated, that the petitioners had proved under the commission against the house of Browne the sum of 139,482*l.* 10*s.* 6*d.*, which was then understood to be the cash balance between the two estates, and claimed the sum of 25,000*l.*, being then supposed as much as the estate of Caldwell & Co. would ultimately pay in dividends on the proof of bad bills against them more than the house of Browne would pay on their bad bills: but that on a more accurate statement of the accounts they conceive, they are entitled to prove a much larger sum than 25,000*l.*; as a balance to a greater amount than that sum will arise on the dividends paid on the said bills by the house of Caldwell & Co. and by the dividends paid by Forbes & Gregory out of the partnership funds of Caldwell & Co. more than will be paid by the house of Browne on Caldwell & Co.'s bad bills. The bills received from the house of Browne by Caldwell & Co. and negotiated by them were the only consideration they had for the bills drawn and issued by them to the house of Browne.

The petition farther stated, that since the above-mentioned proof the petitioners find the cash balance to be upwards of 140,000*l.* against the house of Browne: but that the dividend in respect thereof had been restrained; and the petitioners had only received a dividend on the sum of 34,305*l.* 10*s.*, being the residue of the said cash balance after deducting the sum of 105,694*l.* 10*s.*, being the amount of the bills drawn by the house of Browne, and proved against their estate by the assignees of Forbes & Gregory; which the commissioners had no right to deduct.

WALKER, Ex parte.

The prayer of the petition was, that the assignees of the house of Browne might be ordered to pay to the petitioners the dividend on the said sum of 105,694*l.* 10*s.*, deducted from the proof for the cash balance, with the interest accrued since the order of
[*381] *dividend; and that the petitioners might be allowed to prove such further sum as should be owing on the said cash account; and that an account might be taken between the estate of George Browne and Henry Browne and the estate of Caldwell & Co. of all dividends paid on the said bad bills by Caldwell & Co. and by Forbes & Gregory, and of all the dividends paid on bad bills by the estate of George Browne and Henry Browne; and that in taking such accounts the petitioners might have credit, not only for the dividends the estate of Caldwell & Co. had paid, but also for the dividends paid by Forbes & Gregory on the acceptance of such bills; and that the petitioners might be at liberty to prove against the estate of George Browne and Henry Browne such sums as should appear to be the balance of such account; and that the petitioners might also be at liberty, besides proving the balance on taking the said account, to prove such further sum as should seem proper, in order to give the utmost relief to the creditors on the estate of Caldwell & Co., that the circumstances of the case would admit.

This petition having stood over several times on account of its intricacy, came on to be heard upon the certificate above stated.

Attorney-General and *Mr. Hollist*, in support of the petition:

It is extremely difficult to collect the effect of such very complicated transactions. The justice of the case, if unprejudiced by decision, is, that in some way or other the claim should be made against both estates; and that finally the estate damnified should be relieved. In Lord Thurlow's time it was matter of doubt, whether cross paper could be proved. The first cases were, where the party applying was a solvent person. I do not deny, that in such a case the Court will require him to take up his bill before he receives a dividend; and I must therefore admit the case *Ex parte Browne*. But this difficulty occurs; that the

person taking a security is in a worse condition than if he did not take an indemnity. In *Toussaint* v. *Martinnant*, 2 Term Rep. B. R. 100, *1 Cooke's Bankrupt Laws, 146, it was held, that the bond of indemnity might have been proved under the commission. The same difficulty will arise, if the security is not a bond, but a counter-bill. It is said, the party taking the counter-bill would have as good a remedy without it; and even further, that it puts him in a worse condition; for he certainly would be entitled to stand in the place of the person he paid; and the certificate would not be a bar. The cases decided, where there has been one solvent person, cannot rule, where there is no solvent person on either side. Some arrangement should be made, if possible. It may happen, that the estate of the acceptor may pay 20*s.* in the pound; but not immediately. A case may occur, in which the acceptor may ultimately perform his engagement. In *Curtis* v. *Ashton* so much difficulty occurred, that Lord THURLOW never decided it. The same difficulty was felt in the bankruptcy of Livesey.

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In this case Caldwell & Co. have paid and are likely to pay dividends on these bills to a much greater amount than the house of Browne. The claim is in respect of that excess.

Solicitor-General, *Mr. Cooke*, and *Mr. Pemberton*, for the assignees of the house of Browne:

The object of this petition cannot be obtained consistently with the rules, that prevail in bankruptcy. * * *

One debt can be proved but once. It cannot be proved twice by any contrivance. The principle upon which this claim is made, is a pretended equity, because the estate of Caldwell & Co. is damaged in a greater extent than that of Browne. * *

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If the petitioners claim in respect of dividends paid, they claim in respect of a debt necessarily subsequent to the bankruptcy. A great deal of difficulty arises from not distinguishing between the rights of these three houses. Forbes & Gregory must be considered as a distinct house. Suppose Caldwell & Co. had continued solvent: they would have taken up the bills now in the hands of the assignees of Forbes & Gregory, and to that extent would have relieved the estate of Browne; and therefore would have been at liberty to prove in

WALKER, Ex parte.

respect of that. Are they by the effect of their own bankruptcy to have a proof against the estate of Browne, which, if they had continued solvent, they could not have? If both parties had continued solvent, the bills issued by each house would have been paid by each respectively; and more would have been to be paid by the house of Browne than by Caldwell & Co. by about 140,000*l*. The effect of the bankruptcies is, that a proof in respect of that balance has been already made against the estate
[*384] of Browne. As, in case the bills were paid on *both sides that would be the only balance to be paid to Caldwell & Co., they cannot constitute themselves in any shape creditors for a greater sum. They might transfer the debt to another person: but they cannot by transferring increase it. So much of their debt as they transferred to Forbes & Gregory is gone. It cannot be claimed both by the original creditors and their transferrees. * * *

Attorney-General, in reply:

The question in this case arises on bills, which are a good debt at law. The petitioners have a quantity of bills in their hands, which are a legal debt capable of being proved; and it is a regulation in bankruptcy, that requires the cross paper to be taken up. I admit the qualification, that finally we should recoup to the estate of Browne the dividends they pay.

Toussaint v. *Martinnant* illustrates this claim. The case *Ex parte Marshall* was an attempt to prove one debt twice. I admit,
[*385] that *cannot be done: but this claim has not that effect: for it is not the same debt.

LORD CHANCELLOR:

Are not both estates equally damnified? Take a creditor of one house, who is not connected with the other: he finds the estate, upon which he has a demand, damnified by what it pays towards the debts of the other. The amount of the damage may be different according to the different dividends.

When you take the bills into the account, must you not of necessity suppose all the bills to be good; and how can you by possibility augment the state of the debt by the circumstance

that both parties are become bankrupt? As between each other neither of them is at liberty to talk of the bills being bad. Suppose, they had both continued solvent, and had adjusted their accounts, the sum of 140,955*l.* 15*s.* 5*d.* would have been the exact balance to be paid. That sum might have been discharged either by payment of the balance or a return of paper: but the actual debt between them can never exist upon any other footing than the supposition, that the bills are good. Till Caldwell & Co. pay all the creditors of Browne, who are likewise creditors of theirs, 20*s.* in the pound, they are by proving sharing with the creditors of Browne, who are likewise creditors of theirs.

In *Toussaint* v. *Martinnant* the bond of indemnity could not be proved under the bankruptcy; for at the time of the bankruptcy there was no debt. The Court would not suffer execution to be taken out upon that judgment, when there was no debt due. The bond could only be taken to be a fraud upon the bankruptcy; and that is the use, that was made of it.

If I allow this petition, I must do two things, that are quite impossible. I must hold, that the bankruptcy creates a debt, which did not exist antecedently; and I must hold, that the same debt may be proved twice. Whatever happens after the bankruptcy is all chance. It might have happened, that the house of Browne had the better estate of the two.

The order directed that the proof should stand for the sum of 39,070*l.* 11*s.* 1*d.* only; which at the hearing was admitted to be the balance due on the cash account.

1799.
Jan. 28.

LOUGH-BOROUGH, L.C.

[391]

COUCH *v.* STRATTON.

(4 Vesey, 391—395.)

Settlement, previous to marriage, of the wife's fortune on herself, with a covenant by the husband in consideration of the marriage, &c. and for making some provision for the wife and her issue, to pay within three months after his death 6,000*l.* to the trustees, in trust, if the wife should survive him, and there should be no issue (which was the event), to pay 1,500*l.* to the wife, her executors, &c., and to pay the interest of the remaining 4,500*l.* to her for life: she is entitled to dower; and her share under the statute of Distributions is not a satisfaction or performance of the covenant.

By indenture, dated the 11th of July, 1768, made previously to the marriage of Hugh Stratton and Ursuliana Clarke, two bonds and a promissory note for different sums, to the amount in the whole of 1,000*l.* the property of Ursuliana Clarke, were assigned to trustees, upon trust after the marriage to receive the interest of the said several sums of money secured by the said securities, and pay the same to Ursuliana Clarke for her separate use during her coverture; and after the decease of Hugh Stratton, in case Ursuliana Clarke should survive him, to assign the said securities and the money thereby secured to Ursuliana Clarke.

By another indenture of the same date, reciting the intended marriage, and that it was agreed, that the said Hugh Stratton should, besides the portion secured to the said Ursuliana Clarke by the said indenture of equal date therewith, settle 6,000*l.* upon the trusts thereinafter declared, Hugh Stratton in pursuance of the said agreement, and in consideration of the marriage, and the portion, he would receive, and for making some provision for the said Ursuliana and her issue besides the provision made by the said indenture of equal date therewith, did for himself, his heirs, executors, and administrators, covenant and agree with the said trustees, their executors and administrators, that in case the said marriage should take effect, he, the said Hugh Stratton, his heirs, executors, and administrators, should within three calendar months after his decease pay to the said trustees or their executors or administrators the sum of 6,000*l.* with lawful interest from the day of his death, upon trust, in case the said

Ursuliana Clarke should survive him, having no issue living by him at his death, nor being then *ensient* with such issue, which should be born alive, that the said trustees should pay 1,500*l.* and the interest thereof, part of the said 6,000*l.* and interest, to the said Ursuliana Clarke, her executors, administrators and assigns, for her and their own use; and concerning 4,500*l.* and the interest thereof, the remainder of the said 6,000*l.* and its interest, upon trust to place the same out at interest, and pay the interest thereof to the said Ursuliana, as long as she should live; and after her decease to assign the said 4,500*l.* to such persons and in such manner as Hugh Stratton *should by deed or will appoint, and for want thereof to pay the said 4,500*l.* to the executors and administrators of Hugh Stratton. [*392]

The settlement contained other clauses disposing of the said 6,000*l.* upon other contingencies, which did not happen.

The marriage took place soon afterwards. Hugh Stratton died in March, 1795, intestate, seised of real estate and possessed of leasehold and personal estate, without leaving any issue, and without leaving his wife Ursuliana *ensient*. She took out letters of administration.

The bill was filed by the next of kin and coheiresses at law of Hugh Stratton against his widow; praying, that an account may be taken of the personal estate; and that it may be declared, that the defendant is by the said several indentures of the 11th of July, 1768, barred of dower and of any share of the personal estate under the Statute of Distributions; or, if the Court shall be of opinion she is not so barred, then that it may be declared, that the sum of 1,500*l.*, part of the said sum of 6,000*l.*, which the defendant took under the settlement absolutely, and the life interest, which he took in the sum of 4,500*l.* residue of the sum of 6,000*l.* therein mentioned, ought to have been received and taken by her in part satisfaction of such share of the personal estate of the intestate under the Statute; and that the defendant may deliver up the title-deeds, &c. relating to the real estate.

Solicitor-General and *Mr. Romilly*, for the plaintiffs:

Upon the first question the plaintiffs contend, that it is to

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be inferred from the terms of this settlement, that the fund secured by it was to be the only provision for the wife in case of her surviving her husband: *Vizard* v. *Longdale*, mentioned in *Tinney* v. *Tinney*, 3 Atk. 8; also cited in *Jordan* v. *Savage*, Bac. Ab. tit. Jointure B. 717; also mentioned in Lord Annaly's Reports.

Upon the second question, supposing the defendant not barred by the settlement, her share of the personal estate under the statute, which is much more than the provision under the covenant, must be a satisfaction, or rather, according to some of

[*393]

the cases, a *performance, of what her husband intended to do. *Blandy* v. *Widmore*, 1 P. Will. 324, 2 Vern. 709, which appears by Mr. Cox's note to have been twice affirmed, has been acted upon in *Lee* v. *D'Aranda*, 1 Ves. Sen. 1, 3 Atk. 419, and a variety of cases since. It is impossible to distinguish this case from those. It cannot be distinguished from *Blandy* v. *Widmore* merely upon the circumstance, that the sum of 1,500*l.*, to which the defendant is entitled under the covenant, forms part of the sum of 6,000*l.*; nor from *Lee* v. *D'Aranda*, because it is to be paid, not directly to her, but to trustees, in trust to pay over to her. The distinction, that has been taken, is, where the provision has been less advantageous; as, if it is to be paid at a distant time, &c. There have been many cases of real estate of the same description; that where a man covenants, that upon his death his wife shall take a certain sum out of his property, if he dies intestate, and his widow under the Statute of Distributions takes a sum equal to that in the covenant, it is a satisfaction of the covenant.

Attorney-General and *Mr. Steele*, for the defendant:

The way, in which the first question has been stated, decides it; that the intention is to be collected from the deed. That is the rule in all cases upon wills since *Lawrence* v. *Lawrence*. The Court has expected either an express intention or necessary implication. This deed affords neither. It does not appear, whether the husband had any land at the date of the deed. Probably he had not.

As to the other point, none of these cases are authorities for declaring, that an allowance is to be made in the distribution of the personal estate for this sum of 1,500*l.*; and it must be

carried farther; for if so, it follows of necessity, that the value of the life interest in the sum of 4,500*l.* must also be allowed. The cases cited stand very much by themselves; and the Court has been in the habit of considering them constantly as cases of strict performance; and if it cannot be said, that a covenant is strictly performed, it has never been taken as a satisfaction. Lord HARDWICKE in *Barrett* v. *Beckford*, 1 Ves. Sen. 519, considers those cases in that way. Therefore from the circumstances of those cases and the comments made upon them they are to be considered as cases, in which the covenant was actually performed in the terms of it, or at least in the terms of the agreement, which produced it; for a *covenant to leave is performed either [*394] by leaving expressly, or by operation of law, no disposition being made. Lord THURLOW in *Kirkman* v. *Kirkman*, 2 Bro. C. C. 95, seems not to approve of those decisions; saying, he should have thought, the word "leave" should be taken in an active sense.

There is no pretence to say, this covenant is performed. The intention cannot be doubted. There is nothing to shew, the husband did not mean, his wife should have anything more. The expression in the deed is "for making some provision" for his wife and issue. The inference from that is, that he might then intend to make a farther disposition for them by his will according to his circumstances. It can hardly be doubted, that he knew, he was under this covenant; and with that knowledge he thought, the law would make a proper will for him, satisfying that among his other debts. This fund of 1,500*l.* is blended with the provision, which relates to the 4,500*l.* It could not be the intention, that a part of the sum secured by the whole effect of the entire covenant should be taken as a satisfaction, and the interest of the other part should not go likewise in discharge of the distributive share. If it is to turn upon the supposed intention, the same evidence, that shews the intention, that the 1,500*l.* is to go, as it were, into hotchpot, must likewise make out, that the value of the life interest must be brought into hotchpot in the same manner.

Solicitor-General in reply:

In *Lee* v. *D'Aranda* it was to be done by deed or will. A fair

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argument arises from that, that the word "leave" was, as Lord THURLOW says, used in an active sense.

LORD CHANCELLOR:

You do not go so far as to contend, that the interest of the 4,500*l.* is to be taken as a satisfaction.

Solicitor-General:

No. It is merely an annuity for life.

LORD CHANCELLOR:

Then the covenant is entire.

With regard to the other point here is nothing carrying with it the least implication with respect to dower.

Vizard v. *Longdale* does not, I believe, stand high in point of authority. Not a great while before that case *Lawrence* v. [*395] *Lawrence* † occurred; which was so much contested; running upon the point, whether this Court could hold anything a bar, which is not a bar by the Statute.

Solicitor-General:

In *Vizard* v. *Longdale*, I believe, the question most discussed was, not simply upon the construction of the instrument, but whether that sort of provision by a bond to secure a sum of money could from the nature of the security be considered as a bar of dower. There is strong reason to think so from what is said upon it in Atkyns.

The common decree was made for an account of the personal estate, &c.

† 1 Eq. Ca. Ab. 218, 219; 2 Vern. 365; 1 Bro. P. C. 591.

BOOTH *v.* BOOTH.*

(4 Vesey, 399—410.)

1798.
Dec. 21, 24.

1799.
Jan. 29.

Rolls Court.
ARDEN, M.R.
[399]

Residuary bequest to trustees upon trust to pay the dividends, &c. equally between the testator's two great-nieces until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively, held a vested interest before marriage; being taken out of the general rule from the Civil Law; that *dies incertus in testamento conditionem facit.* One of the legatees being dead without having been married, the Court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage or her death before marriage.

ROBERT BRAGGE by his will, dated the 21st of January, 1777, devised his real estate to his great-nephew Robert Booth and his issue in strict settlement, with remainder to his brother Richard Booth and his issue in strict settlement; with similar remainders to their sisters Phœbe Booth and Ann Booth, and their issue respectively.

The testator also gave a legacy of 600*l.* to his great-nephew Robert Booth, and 100*l.* to Robert Lathropp, whom he appointed sole executor; and, after giving some other pecuniary legacies, he gave all the residue of his estate and effects, which should remain after paying his debts, funeral expenses, charges of proving his will, and the legacies, to Sir John Chapman and Robert Lathropp, their executors, administrators, and assigns, upon trust as soon after his decease as conveniently might be to collect and get in same, and invest same from time to time in some of the public funds or upon government or real security in their joint names or in the name of the survivor with power to change such funds; and upon trust to pay the dividends and produce thereof, as the same should from time to time become due, equally between his great-nieces Phœbe Booth and Ann Booth until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively.

The testator died soon afterwards. Richard Booth took a considerable real estate upon the death of his father.

* *Re Wrey, Stuart* v. *Wrey* (1885) 30 Ch. D. 507, 54 L. J. Ch. 1098.

BOOTH v. BOOTH.

At the date of the will Phœbe Booth and Ann Booth were both of age; and they filed the bill to have their interests in the residue declared: but the MASTER OF THE ROLLS thought that, as the plaintiffs might marry, the question was not ripe for decision.

By the decree made in that cause on the 13th of June, 1793, the fund was ordered to be transferred to the *Accountant-General;* and an inquiry was directed for the purpose of ascertaining, who were the testator's next of kin at the time of his death.

The report stated, that the plaintiffs and their two brothers Robert and Richard Booth were the testator's next of kin at the
[*400] time *of his death; and that the plaintiff Phœbe Booth died in June, 1797, without having been ever married. By her will, made shortly before her death, she appointed her brother, the defendant Richard Booth, and the plaintiff Ann Booth, her executors; and having disposed of certain real estates, and given a legacy of 100*l.* to her brother Richard Booth for his trouble as one of her executors, she gave the residue of her personal estate to the plaintiff Ann Booth, but with such request annexed, as therein mentioned.

The cause coming on for farther directions, the question was whether the share of Phœbe Booth in the residue of the personal estate of Robert Bragge under his will was an absolute vested interest in her, to be transferred to her executors, or whether in the event of her having died unmarried it belonged to the next of kin of Robert Bragge as undisposed of.

Mr. Lloyd and *Mr. Wooddeson*, for the plaintiff:

This was clearly a vested interest in Phœbe Booth, though she never married according to *May* v. *Wood*, 3 Bro. C. C. 471, and other cases; marriage not being a condition precedent. The words "until" and "when" denote the time of payment; and postpone that only; not importing a condition precedent to the vesting of the interest. This is a personal legacy. There is scarce an instance, in which the dividends having been given, and the capital being directed to be paid to the same person at a future period, it has been held a condition precedent. In *Daintry* v. *Daintry*, 6 Term Rep. B. R. 307, which was sent from this Court,

nothing but the annuity was given to the devisee, until he married; yet the Court of King's Bench held, he had the absolute property. From *Boraston's* case, 3 Co. 19, down to *Doe* v. *Lea*, 3 Term Rep. B. R. 41, the decisions have been uniform, that, as a general proposition, the word "until" does not prevent the vesting. In *Atkinson* v. *Paice*, 1 Bro. C. C. 91, the LORD CHANCELLOR relied on *Tomkins* v. *Tomkins*; though it does not appear in the report; and that case was also relied on by Lord MANSFIELD, in *Goodtitle* v. *Whitby*, 3 Bur. 234.

It will be contended, that there is a distinction between an event that is certain, and must come, and such an event as marriage; and there are several cases that may at first sight appear in favour of the defendant; as *Garbut* v. *Hilton*, and *Atkins* v. *Hiccocks*, 1 Atk. *381, 500; and *Elton* v. *Elton*, 3 Atk. 504; [*401] 1 Ves. Sen. 4; 1 Wils. 159: but there are striking distinctions. Those were all gifts of a legacy, not a residue, and upon the condition of marriage requiring consent. Therefore the legacies were held not due; and the rule of the Civil Law, that *dies incertus in testamento conditionem facit*, took place. Where the testator affects to dispose of the residue, there is always a strong presumption against presuming an intestacy. In all those cases there are express words of condition: in this there are none. In *Atkins* v. *Hiccocks* Lord HARDWICKE states the rule of the Civil Law; and cites a passage from Swinburne. There is another passage in the same book, 298, folio edition, which is very strong where the case is put of a sum of money given to a young maid for and towards her marriage; and she dies unmarried: Upon the question, whether it is due to her executor, Swinburne gives his opinion, that it is due; especially if she was marriageable; and he cites many authorities. *Ward* v. *Trigg*, cited in *Elton* v. *Elton*, 3 Atk. 505; 1 Ves. 5, is a strong authority, that it is not true as a general proposition, that in all such cases an actual marriage is necessary.

In this case the produce of the whole residue is given to these great-nieces immediately after the testator's decease until their respective marriages; and in giving the capital he describes it as their respective moieties or shares thereof.

BOOTH v. BOOTH.

Mr. Graham, for the defendants, the other next of kin:

Upon the words of this will and the authorities it is impossible to contend, that there is a necessary implication, that the testator intended the capital of his residuary personal estate to vest at all events in his great-nieces. The words clearly express in plain language a different idea. The dividends only are to be paid, until they marry; and then from and immediately after their respective marriages, without any separation of the sentence, the capital is to be assigned and transferred in moieties. He has expressly negatived the vesting till marriage; therefore if they lived to the age of ninety unmarried, it is impossible they could have had more than the dividends. * * *

[403—404] [*Mr. Lloyd* in reply.]

1799. *Jan.* 29.

MASTER OF THE ROLLS:

[405] This case deserved very great consideration, lest it should be supposed, that the Court had by deciding it transgressed the rule laid down as to legacies given payable at an uncertain time. When it was argued, I was impressed with an idea, that it was distinguishable from all the cases in respect of its being not the case of a legacy, but a residue; and all the cases, in which that rule prevailed, were cases of mere legacies, to be paid out of the personal estate by the executor; the residuary legatee, or the executor, if he was to have the residue, having only to pay at the time the legacy became due, and taking the residue. But this is not that case, but the case of a residue.

I do not see, that any of the pecuniary legacies are given to Phœbe and Ann Booth; though I do not think, that would make much difference: they are both comprehended in the limitations of the real estate. It is to be observed, that Robert Lathropp only is executor: Sir John Chapman is a trustee, but not executor. Therefore it is not a gift of the residue to the executor, but to him and another person upon these trusts. Both these residuary legatees were adults at the time the residue was given to them: if it had been otherwise, it might have made some ingredient in the argument. The event, that has happened, is that one of them has died without having ever been married;

and the bill is filed by her sister claiming under her will, and insisting, that she was entitled, though she never married; that marriage was not a condition precedent, upon which the residue was to vest; but merely denoted the time, at which the residuary legatees were to be put in full possession of the property.

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The argument upon the part of the plaintiff turned upon a ground, that is frequently taken upon legacies payable at a future day, which on account of the death of the legatee never arrives; that the time being mentioned merely as the time of payment on account of the situation and circumstances of the party is never held to defeat the legacy. The cases were commented upon on both sides. *Atkinson* v. *Paice* was mentioned; which I lay out of the case. It does not prove much. Of the other cases *Boraston's* case, *Doe* v. *Lea*, *Goodtitle* v. *Whitby*, and *Mansfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, are in favour of the plaintiff: but it was properly observed, they were all cases of an absolute interest; the possession of which was to be given at a certain time. The reasoning upon them would be sufficient for the plaintiff, if applied to this case; for the reasoning is, that though the testator has given a partial interest till that time, those words of reference as to the time are not to be considered as referring to the time, upon which only the devise is to take place, but the time, at which the devisee or legatee is to be entitled to the full and absolute benefit of the bequest; and a reason is given, which does not apply to this case, that it cannot be supposed, that, if the devisee or legatee should die before that time, leaving children, the intention was, that children should not take. I shall not comment upon the cases. The arguments of the Judges, who decided them, are very full to shew, that such words do not make a condition precedent, but merely denote the time of absolute possession.

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It is very true, the cases relied on by the defendant, *Garbut* v. *Hilton*, *Atkins* v. *Hiccocks*, and *Elton* v. *Elton*, are very distinguishable from this. First, they are all cases of mere legacy, not of a residue: Secondly, in the very gift of the legacy it is perfectly clear, as Lord HARDWICKE observes in *Elton* v. *Elton*, that they are all cases of a condition absolutely precedent. It is impossible not to see, that the testator meant the legatee to

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bring himself into the circumstances specified. In all those cases the legacy was given upon a marriage with a given consent. It is impossible in that sort of case to say, the legatee could be entitled without that. It would be to put a violation upon the very words of the bequest. Therefore the plaintiff's counsel are fully justified in saying, those cases cannot be brought to [*407] bear upon *this question. They are cases of legacies, and conditions precedent. They were considered and determined as such.

For the defendant, besides the cases I have mentioned, the late case of *Batsford* v. *Kebbell* † was relied on; in which the LORD CHANCELLOR took a great distinction between a bequest of a sum of money payable at a future time and a gift of the interest until a certain time and then a gift of the principal. His Lordship gives a short judgment; but upon consideration of all the cases he laid it down, that it is necessary to shew, the principal was intended to be given, before the time arrived; and in that case he for that reason held, the legacy (for that was the case of a legacy) never attached.

It is to be considered, whether this case is in its circumstances distinguishable from all these cases; and I am of opinion, it is. It is distinguished from *Batsford* v. *Kebbell* in this respect; that this is in fact an absolute gift of the residue to trustees. It may be said, so much of the trust as is not sufficiently declared must go to the person, who would be entitled, in case there was no disposition: but I think, it is equivalent to saying, in trust for them, to pay and dispose of the dividends and interest to them till their respective marriages, and then to assign and transfer the principal: for it is not merely a gift of the interest until marriage, stopping there, and after the marriage a gift of the principal: but it is impossible not to see, that these words are equivalent to a gift of the principal. The testator considers it as given. He speaks of it as their shares of the residue. The day of their marriage is the time, at which they are to be put into actual possession of their shares. I cannot construe this otherwise than an absolute gift of the residue, qualified only thus, that until their marriages, until when, I suppose, he thought, they would not want it, they were not to have the actual possession.

† *Ante*, p. 15.

That there is a difference between a bequest of a legacy and a residue with reference to this point cannot be denied either upon principle or precedent. Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property. How did this testator dispose of it? It might be supposed natural, that they would marry. It might be in his idea, that there might be a possibility, that *they might not marry. If he did not mean by the residuary bequest to dispose of the absolute interest, it was natural, that he should declare, what should be the case, if they should not marry. He has done that. So much as to the principle.

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Next, how far in point of precedent has a gift of the residue been held distinguished from a mere legacy. In *Monkhouse* v. *Holme*, 1 Bro. C. C. 298, Lord LOUGHBOROUGH comments upon all the cases; and among others mentions *Love* v. *L'Estrange;* upon which I mainly rely in this case. His Lordship says, that case was determined upon the ground of its being a residue; and, if the report is correct, he gives a decided opinion, that *Love* v. *L'Estrange*, if it had not been the case of a residue, would not have been decided, as it was; being of opinion, that, if it had not been the case of a residue, but a legacy, it would not have been a vested interest. I am not now commenting upon the point, whether that argument strictly applies to *Love* v. *L'Estrange*. It is enough for me to avail myself of Lord LOUGHBOROUGH's comment upon it; who was evidently of that opinion upon the ground, upon which *Batsford* v. *Kebbell* was decided. In *Monkhouse* v. *Holme* Lord LOUGHBOROUGH seems to be of opinion, as he was in *Batsford* v. *Kebbell*, that in *Love* v. *L'Estrange*, there being no gift of the principal until the age of twenty-four, and only a partial gift in the mean time, from the age of twenty-one, not so much as the interest, the principal could not attach until that time, unless upon its being the case of a residue; which distinguished it from *Batsford* v. *Kebbell*, a case in other respects very like it. I do not find, that is mainly insisted on in the printed case of *Love* v. *L'Estrange;* and I see, in *May* v. *Wood* I stated that fact, that it was not insisted on; and that I did not see any difference between the cases of a legacy and a residue. If I did say so, I spoke with too much latitude; for I then thought, and

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I now think, there is a distinction; though in that case it made no difference; the words being so like those in *Doe* v. *Lea*, and *Goodtitle* v. *Whitby*; in the latter of which some principles are laid down by Lord MANSFIELD, with regard to all words, that may be construed words of reference to the time, at which possession is to be given, and not words of condition, that seem to me to govern the decision of this case. The first principle [*409] laid down by Lord *MANSFIELD is, that wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property.

In that case the estates were given to trustees and their heirs, upon trust to apply the rents and profits for the maintenance and education of the nephews of the devisor during their minorities; and when and as they should respectively attain the age of twenty-one then to the use of his said nephews.

Another principle laid down by Lord MANSFIELD is, that, where an absolute property is given, and a particular interest given in the mean time, as until the devisee shall come of age, &c. and when he shall come of age, &c. then to him, &c. the rule is, that shall not operate as a condition precedent, but as a description of the time, when the remainder-man is to take in possession.

If this will had mentioned a particular age instead of marriage, there could be no doubt, that these cases would have absolutely governed it; for though I do not deny, that *dies incertus in testamento conditionem facit*, I say, admitting that principle, that marriage is the time, at which they were to be put in possession. It is true, the testator fixes the marriage to the time, at which they were to be put in possession. It is not a marriage under any qualification, but whenever they should marry. Where is the absurdity, that that time should be fixed, as the time for their being put into possession? The testator thought that the time at which they might want it, and until which it would be better applied upon that trust for their benefit.

Therefore without breaking in upon that rule of the Civil Law, or the cases before Lord Hardwicke, to whose doctrine I wish to refer, that, it is impossible not to see, that the testator in those cases did mean those circumstances to be conditional, I am of

opinion, there is nothing in this will to shew a condition precedent to the vesting of this interest. Another reason may be given. Suppose, one of these sisters had married, and had children: this interpretation puts it in the power of the other to provide for those children. It has been determined, that where a legacy is given, payable at the age of twenty-four, the legatee at the age of twenty-one may dispose of it by will. The same reason applies to this case.

Upon these circumstances, and the ground, that this is a [410] residue, and upon the words of the bequest in this case, I am of opinion that the plaintiff is well entitled under the will of her sister to her share of the residue.

The counsel for the plaintiff applied for a direction for payment of her moiety.

MASTER OF THE ROLLS:

I doubt as to giving that direction. In all these cases the Court has never yet accelerated the payment. It may be a vested interest, and disposable, but not tangible in the mean time. It is worth consideration upon the question, whether the survivor has any right to demand payment and to be put in possession of this vested interest until the day of her marriage. Suppose, in *Lore* v. *L'Estrange*, where the testator had anxiously given only 10*l*. a year till Walter Nash should attain the age of twenty-four, having attained the age of twenty-one he had brought his bill: does it follow, that he would have been put in possession? No other person could have had any advantage from it in that case. It is like the case of an infant, who may dispose of property, though he cannot have possession of it, until he is of age. I will consider of this point. I am not sure, it may not be a wise provision, intended for the benefit of the legatee.

By the decree it was declared, that the plaintiff Ann Booth and the defendant Richard Booth as executor and executrix of the testatrix Phœbe Booth are entitled to one moiety of the Bank Annuities and Bank Stock, constituting the clear residue of the personal estate of the testator Robert Bragge, and it was ordered,

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that one moiety of the said Bank Annuities and Bank Stock be transferred accordingly, to be applied by them to the purposes in the said testatrix's will mentioned; and that the interest and dividends to accrue due on the other moiety of the said Bank Annuities and Bank Stock be from time to time paid to the said Ann Booth during her life; and in case of her marriage the said Ann Booth, or in case of her death before marriage any other person interested in the said Bank Annuities and Bank Stock, are to be at liberty to apply to the Court, as there shall be occasion.

1798. *Feb.* 5.

1799. *Feb.* 9.

LOUGHBOROUGH, L.C.

[411]

LORD HARDWICKE *v.* VERNON.

(4 Vesey, 411—418.)

Account between principal and agent settled from loose papers; the agent having kept no regular books: after his death liberty was given to surcharge and falsify upon allegation of errors since discovered.

Agent, employed to sell estates, took them for himself under colour of a fictitious purchase; and sold part: after his death an inquiry was directed to ascertain the real value; according to which his estate was to be charged: the principal having an option to take what remained unsold; and, the agent having fraudulently prevailed on his principal to execute a lease at a rent under the real value, the agent's estate was charged with the loss arising from that.

CHARLES DE LAET, Esq., had been employed by the late Lord Hardwicke for several years as receiver and manager of his estates in the counties of Middlesex and Hertford, and continued to act in that capacity after his lordship's death down to the year 1792. Mr. De Laet having been for some time much pressed by the present Lord Hardwicke, who had attained the age of twenty-one in 1783, to give an account of his receivership, and producing only loose papers, and acknowledging, that he had kept no regular books of account, it was agreed, that Edward Russell should be employed for the purpose of investigating his receipts and payments. De Laet furnished Russell with twenty-one annual accounts, commencing at Michaelmas, 1770, and ending at Michaelmas, 1791, but made out from loose and irregular papers. In the course of making out this account, which took up above two years, several errors, false charges, over-

charges, and omissions, were pointed out, some by De Laet himself; and upon a balance of the account of errors the sum of 1,650*l.* 0*s.* 1*d.* appeared to be due to Lord Hardwicke in that respect; which account was admitted by De Laet, and signed by him, including errors down to the 19th of May, 1792. The general balance due to Lord Hardwicke upon the account so made out was 69*l.* 8*s.* 10½*d.*; which was paid by De Laet; and a bond of indemnity in the penalty of 9,000*l.* against such payments charged by De Laet in the account, for which he could produce no vouchers, was executed by him to Lord Hardwicke upon the 12th of May, 1792. De Laet also paid Russell 200*l.* as a compensation for his trouble in investigating the account.

In 1786, De Laet being employed by Lord Hardwicke to sell certain estates sold them to John Wright for the sum of 5,550*l.*

By indentures of lease, dated the 26th of February, 1790, certain tithes, called the Ridge tithes and Almoners tithes, and certain woods, called Tittenhanger, all being the property of Lord Hardwicke, were let to Justinian Casamajor, Esq. for a term of twenty-three years from the 12th of May preceding at the yearly rent of 196*l.*, and subject to other annual outgoings to the amount of 71*l.* 4*s.* 6*d.* The affair was transacted wholly by De Laet.

In June, 1792, De Laet died; having devised his real estates [412] in the counties of Middlesex and Hertford to Justinian Casamajor, Esq. for life, with remainder to his son William Charles Casamajor and his issue male in strict settlement, with various remainders over, the ultimate remainder to Justinian Casamajor and Humphrey Sibthorpe in fee; and he disposed of all the residue of his real and personal estates upon the trusts therein mentioned.

The bill, filed by Lord Hardwicke against the executors and devisees of De Laet, had three objects: first, to open the account, upon charges of errors, false charges, over-charges, and omissions, discovered by Russell since the death of De Laet, to the amount of 4,644*l.* 10*s.* 9*d.*

Secondly; as to the estates sold to Wright. With respect to those estates, the bill charged, that they were sold for much less than their real value; and that De Laet agreed to sell them to Wright for the sum of 5,550*l.* upon condition or under some

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agreement or understanding, that Wright should convey to De Laet a meadow, called Sleapside Meadow, part of the same estates, without any consideration or for some inadequate consideration; which meadow was conveyed accordingly; and De Laet continued in possession of the said meadow till his death; and since that time the defendant Casamajor has been in possession under his will.

Thirdly; as to the lease of the tithes and woods to Casamajor. The bill charged, that in and since the year 1786, the said tithes and woods were worth yearly between 400*l.* and 500*l.*, to be let upon a lease for twenty-one years; and that Levi Lavender, one of the plaintiff's tenants, applied for such lease to De Laet; who offered it to him at a rent of 500*l.* a-year. Lavender offered to take it at a rent of 400*l.* a-year, which De Laet refused.

The bill therefore prayed a general account of all dealings and transactions of De Laet with regard to the plaintiff, and of all sums of money received and paid by De Laet on account of the plaintiff or his estates during the time aforesaid; and that the difference between the sum of 5,550*l.*, for which De Laet sold the said estates to Wright, and the real value of the said estates, including Sleapside Meadow, at the time of such sale may be ascertained; and also, that the damage sustained by the plaintiff
[*413] by reason of the said *lease being made for the rent of 196*l.* may be ascertained; or that the said lease may be declared void, and be delivered up to be cancelled; and that the defendant Casamajor may be decreed to deliver up possession of the premises included therein, and account for the real value of such premises from the date of the lease.

The bill, as far as it sought to open the account, was resisted on the ground, that the account stated by Russell was considered by all parties as a final settlement, not by De Laet only, but by the plaintiff himself.

In support of that objection the defendants relied on the payments of the balance to the plaintiff and the sum of 200*l.* to Russell, the acceptance of the bond of indemnity, and a letter from the plaintiff to De Laet, dated the 4th of May, 1792, before the payment of the balance; in which the plaintiff after expressing his concern, that it was not in his power to write sooner

concerning the final determination of the matters then depending between them, proceeds thus:

"The investigation of Mr. Russell has only put the accounts in the form, in which they ought to have been drawn up each year; and therefore I think it perfectly right and fair, that you should pay the expense of that investigation. It is also right, that I should be indemnified by you against the chance of paying such bills as are in your accounts stated to have been paid. For this reason Mr. Russell waits upon you with a bond for that purpose; the execution of which by you together with the instrument accompanying it will secure me against such contingency. After this I shall not be desirous of continuing in any respect a creditor of your's: nor shall I wish to receive from you anything more than what I can prove myself entitled to. The errors and omissions will leave a balance in my favour after payment of your salary. This I shall state to you as soon as possible; and after that I am ready to send you a full release. I think, Mr. Russell should have the sum of 200 guineas paid him for the expense and trouble of the investigation; and to which I trust you will have no objection."

On the other side the letters of De Laet were produced, declaring, that the plaintiff should not lose a shilling by him; that *he, or his executors, if he should die, would pay the last farthing, &c. [*414]

The defendant Casamajor by his answer submitted, that Russell being nearly two years employed in the investigation, and having had all the assistance and information De Laet could give him, it is not probable, that Russell can have any better information than he might have obtained in the life of De Laet. Besides, as such account has been made out since the death of De Laet, it must be considered as a partial account; and if De Laet had been living, he might have given full answers and explanations to the charges made. Therefore, and as infants are interested in his real and personal estate, the defendant submits, that the account settled in De Laet's life-time ought not to be opened; and, if there is any question, whether the account should be opened, or not, it ought to be by a charge before the Master in the cause instituted by the executors of De Laet for

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taking the accounts of his personal estate, &c. As to the Sleapside Meadow, the defendant Casamajor admitted, that he was in possession of that meadow since De Laet's death; and that he had seen a conveyance of it dated the 7th of May, 1789, from Browne, a trustee, and Wright, to De Laet in fee in consideration of 160*l.*; the receipt of which sum was acknowledged upon the back, signed by Wright. He believed, the meadow was let at 7*l.* a-year.

John Wright deposed, that in 1788 De Laet told him, if he had any money to spare, he (De Laet) could buy him an estate, by which he could make some money for the deponent. He answered, he had 1,800*l.* Soon afterwards De Laet informed him, he had bought the estate, but it came to much more money; but that he himself would find the rest. Soon afterwards he procured the said estate to be conveyed to the deponent; and afterwards informed him, he (De Laet) could dispose of such estate again to different people; and he accordingly afterwards disposed of part thereof to three different persons: viz. Mr. Ridge, Captain Lambert, and a merchant in the city, whose name the deponent does not recollect; and the deponent executed conveyances of such parts, but, he believes, not the whole of the said estate; at which time De Laet paid him 1,900*l.* About a month before the death of De Laet the deponent executed a conveyance at his house, and does not know of what, unless the said
[*415] field; having executed *it in confidence of the representation of Vernon and De Laet, that it was necessary for him to do so without knowing the purport. The deponent received no profit from the transaction except 100*l.* more than the 1,800*l.*, he had advanced.

Levi Lavender deposed, that he was employed several years in the management of the woods, comprised in Casamajor's lease by De Laet; who in 1786 offered to let the said woods and the tithes comprised in the said lease for a rent of 500*l.* a-year. The deponent offered 400*l.* a-year. He conceived them worth that rent for twenty-one years; and would now give it. When the tithes were raised by De Laet, the deponent's tithes were not raised: but De Laet desired him to attend the meeting, and to say, that he had settled his tithes with De Laet.

Attorney-General, and *Mr. Grant*, for the plaintiff:

Upon the first point, this is not a settled account; and if it is,

this Court will not consider it so under such circumstances. The letters of De Laet shew, that it was not his intention, that these accounts should be final and conclusive. There was no intention on either side to have the account considered as closed. Russell had no authority to make a conclusive settlement of the account. He was not an arbitrator. He was employed in the mere capacity of an accountant. He was paid by De Laet for stating the account for him; and had De Laet's assent to every alteration. He was obliged to state the account from De Laet's information; and many things were considered unadjusted. The plaintiff thought, that, when the account should be settled, a release was to be given. Upon the whole of this case the plaintiff is entitled at his option either to open the account generally or to be at liberty to surcharge and falsify.

As to the transaction of the sale to Wright and the conveyance [416] of the Sleapside Meadow, part of that estate, to De Laet without consideration, an inquiry must be directed as to the value of the estates sold; and if it shall be found to exceed the sum of 5,550*l*., the price, that was paid, the excess must be answered out of the estate of De Laet. With respect to the Sleapside Meadow, the plaintiff must have the option to take it, or to have what shall be found to be the real value.

As to the lease of the woods and tithes to the defendant Casamajor there is no evidence of fraud in him in obtaining it: but De Laet intended in violation of his duty to his principal Lord Hardwicke to give Casamajor an advantage in this lease. De Laet therefore being the agent both of the lessor and lessee, it is not fit, that Casamajor should retain the benefit of it. De Laet, if he did not studiously conceal from the plaintiff, that Lavender had been in treaty with him for a lease of these woods and tithes, certainly never communicated his offer.

Solicitor-General, and *Mr. Mansfield*, for the defendants, contended, that the account ought not to be opened; and they resisted the inquiry as to the other points.

LORD CHANCELLOR:

The accounts having been so improperly kept, when Lord

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Hardwicke began to look into his own affairs, they came to this arrangement; that an accountant should be employed to prepare a statement of the accounts in a regular form. It appears perfectly understood on both sides, that the account should be stated as drawn up by Russell, and so far as he had gone it is admitted to be an account, that was not to be unravelled, but subject to such errors as had not then been suggested. On both sides it was expected, that the balance might be much larger.

The justice of the case is, that the account shall stand, as stated, by Russell; with liberty to the plaintiff to surcharge and falsify.

With respect to the other two circumstances of the cause, certainly the transaction as to the sale of the estate very much impeaches the morality of De Laet's character. The transaction is different from that in *Fox* v. *Mackreth*,* and worse. The plaintiff employed De Laet to sell these estates to the best advantage. Wright is set up as the purchaser. He had no specific knowledge of the purchase. The estates were sold in parcels. Part was not sold. The names of three purchasers appear: two only were known to Wright. De Laet was in fact the purchaser from the plaintiff; and the plain rule of justice is, that he should be charged with the actual value of the estate.

[417] As to the Sleapside Meadow, the plaintiff has a right to take that, if he pleases.

The decree directed, that the account stated by Russell up to the 19th of May, 1792, shall stand; with liberty to the plaintiff to surcharge and falsify.

It was referred to the Master, to whom the cause of *Browne* v. *Casamajor*† was referred, to inquire, what was the value of the premises conveyed by the plaintiff to John Wright by the indentures of the 15th and 16th of March, 1787, in consideration of 5,550*l*., at the time the same were so conveyed, and to distinguish what was the value of the said premises respectively; and to inquire, to whom the said premises or any of them were

* 2 R. R. 55.

† The cause instituted by the executors of De Laet for establishing his will and taking the accounts.

sold or conveyed by Wright or De Laet; and what were the prices paid for the several parcels of the said premises respectively: the plaintiff to be at liberty to elect, whether to abide by the valuation of the said estates, or by the prices, at which the same were sold; and, as to the Sleapside Meadow conveyed by Wright to De Laet for the nominal consideration of 160*l.*, the plaintiff to elect, whether he will accept of what shall appear upon the inquiry to be the value thereof, or whether he will insist upon the same as owner thereof. It was farther directed, that the parties shall proceed to a trial at law by a special jury at the next assizes for the county of Hertford upon the following issue:

What was the annual value between the years 1786 and 1790 of the tithes, woods, and premises, comprised in the lease, dated the 26th of February, 1790, granted by the plaintiff to John Casamajor, to be let to a tenant for a term of twenty-three years, subject to the covenants, payments, and outgoings, in the lease mentioned on the part of the lessee.

Upon the trial of that issue the verdict was, that the tithes, woods, and premises, in the said lease mentioned, to be let to a tenant for a term of twenty-three years, subject to the covenants, payments, and outgoings, on the part of the lessee, were *worth a clear rent of 320*l.* a-year between the years 1786 and 1790. [*418]

1799. *Feb.* 9.

The cause was brought on for farther directions upon that branch only, that was the subject of the issue.

The *Attorney-General* and *Mr. Grant*, for the plaintiff pressed for an account of the loss incurred by him in respect of the lease against the estate of De Laet upon the foot of the verdict.

The *Solicitor-General* and *Mr. Mansfield*, for the defendants, complained in strong terms of the verdict, which was obtained chiefly upon the evidence of Lavender: but they did not desire a new trial.

They also contended, that it was a new equity to ask damages

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against the estate in respect of a loss arising from a tort, that died with the person.

LORD CHANCELLOR upon that objection observed, that it was a fraud; and though an action, sounding in damages, dies with the person, the ground of jurisdiction in equity is, that it is a debt.

The decree therefore directing the account, Mr. Casamajor rather than account in respect of the remainder of the term at the rate established by the verdict offered to give up the lease.

[*Note.*—The report of this case on further directions in 1808 (14 Ves. 504) will be given in a later volume of the Revised Reports.]

1798.
March 14.

LOUGHBOROUGH, L.C.

[430 n.]

KNAPP *v.* WILLIAMS.*

(4 Vesey, 430, note.)

A mortgage of turnpike tolls is within the statute 9 Geo. II. c. 36.†

[THE following short report of this case is taken from the note in the report of *Corbyn* v. *French*, 4 Vesey, at p. 430.]

The defendants were governors of the charity for the relief of the poor widows and children of clergymen; and they claimed a mortgage for 500*l.* upon the tolls arising under Acts of Parliament, 3 Geo. I.; 10 Geo. I. c. 6; 11 Geo. II. c. 6, for the repair of the Brentford turnpike road. The security was taken upon the tolls simply: not including the toll-houses and gates.‡

The question, whether this was within the statute 9 Geo. II. c. 36, came on upon exceptions to the Master's report.

* *Re Christmas* (1886) 33 Ch. D. 332, 55 L. J. Ch. 878; *Re David* (1889) 43 Ch. D. 27, 31, 59 L. J. Ch. 87.

† This case and the following case of *Corbyn* v. *French* are not applicable to the wills of testators dying after the passing of the Mortmain and Charitable Uses Act, 1891 (5th August, 1891).—O. A. S.

‡ In *Myers* v. *Perigal*, 2 D. G. M. & G. 619, Lord St. LEONARDS, L.C., observed that in *Knapp* v. *Williams*, there was an actual assignment of the real property on which the tolls were secured. This observation however appears to have been based on some misapprehension of the report of *Knapp* v. *Williams*, and to have been erroneous. See *Re Christmas*, 33 Ch. D. at p. 340, and the note on that page.—O. A. S.

Solicitor-General and *Mr. Richards*, for the exceptions:

This is certainly not within the mischief, which is the object of the statute: but an opinion has prevailed, that such interests are within the Act, on the ground, that the turnpike-houses and conveniencies for levying the tolls are vested in the commissioners, and made the subject of the mortgage. The case upon Serjeant Aspinall's will before the Master of the Rolls turned upon that: the houses being demised, the MASTER OF THE ROLLS thought, an ejectment might be brought. This security is made in a different manner; the Court of King's Bench have determined, that the commissioners cannot delegate their power to erect gates, &c.

Mr. Mansfield and *Mr. Alexander*, for the report:

The statute restrains dispositions of any charge or incumbrance affecting any lands, tenements, or hereditaments. This is an incorporeal hereditament. There is no distinction between these tolls and tolls arising from a navigation, a fair, or a market. All tolls, that are private property, are rateable to the poor as hereditaments. * *

LORD CHANCELLOR:

It occurred to me, that it had been determined, that a mortgage of turnpike tolls is within the statute. The mortgagee would have a right to come into this Court to have an account, and a receiver appointed. He would have a right by the aid of this Court to have the tolls specifically applied to his mortgage. Consider, what the point of law is, from the nature of the interest. It is not at all within the mischief: but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the Act these tolls granted in perpetuity are certainly a hereditament: it is in its nature an interest affecting land. He might bring an assize for these tolls, I should think.

There is another species of toll, which gives no right at all in the land. That is a toll thorough.

I think, it falls within the general words of the statute.

The exceptions were overruled.

1799.
Feb. 14, 16, 18.

Rolls Court.
ARDEN, M.R.

[418]

CORBYN *v.* FRENCH.†

(4 Vesey, 418—435.)

Legacy to the trustees of a chapel for Protestant Dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, is void under the stat. 9 Geo. II. c. 36. The mortgage having been paid off by other funds in the testator's life, the Court would not say, the legacy might not have been applied in repairing or sustaining the chapel; but was of opinion, it could not be applied to any other charitable purpose.

Bequest of money to enable a trustee for a charity to complete a contract for the purchase of land is void by the statute 9 Geo. II. c. 36.

JOHN BROWN by his will, dated the 18th of June, 1785, after giving some specific and pecuniary legacies gave and bequeathed the residue of his property in the following manner:

"The rest and residue of my estate and effects of what kind soever I direct may be disposed of and the money arising from
[*419] *the sale to be paid unto my said trustees to be by them invested in the public funds or some other good security at their discretion, and the interest thereof to be paid to my dear wife Elizabeth during her natural life: at her decease I direct, that the sum of 500*l.* be paid to the trustees of the chapel in Essex-Street (whereof the Reverend Mr. Lindsay and the Reverend Doctor Disney are ministers) to be applied by them towards the discharge of the mortgage on the said chapel: And I further give and bequeath to my aforesaid niece Elizabeth Cooper the sum of 2,000*l.* or to her proper representative in case she should not be living at the decease of my wife. I also give to each of the children of my sister Elizabeth, viz. John, Dorothy, William, and Christopher, or their representatives or representative the sum of 2,000*l.* The remainder I direct to be equally divided between Josiah Messer aforesaid and John, the son of my very worthy and much respected friend and partner Thomas Corbyn, share and share alike."

The testator appointed —— French and Josiah Messer, whom he had nominated as trustees, and —— Stacey to be his executors.

By a codicil, dated the 13th of August, 1787, after giving some legacies he proceeded thus:

† See the preceding case, *Knapp* v. *Williams*.—O. A. S.

"At the decease of my dear wife I give unto Thomas Rogers, Matthew Twogood, and Michael Dodson, Esquires, treasurers to the new Academical Institution among Protestant Dissenters or to the treasurers at the time the sum of 2,000*l.* to be by them applied upon the purposes of the said Institution: the remainder after payment of all legacies, &c. as before directed by my will."

The testator died in 1788. Elizabeth Brown, his widow, died upon the 24th of December, 1797.

John Barker, one of the children of the testator's sister Elizabeth, died during the life of the testator; leaving a widow and children. Christopher Barker, another son of the testator's sister, died soon after the death of the testator, but during the life of his widow.

The bill was filed by John Corbyn, one of the residuary legatees, praying an account of the personal estate, debts, &c.; that the said two legacies of 2,000*l.* each given to John and Christopher Barker, and also the legacy of 500*l.* to the trustees of the Essex-street Chapel, and the legacy of 2,000*l.* to the treasurers of the Academical Institution for Protestant Dissenters, may be declared void, and to have fallen into the residue.

The trustees for the chapel in Essex-street by their answer [420] stated, that they believe, the chapel, or the equity of redemption thereof subject to a mortgage, upon which was then due the sum of 886*l.* 10*s.* and some interest, was in January, 1783, conveyed to and vested in certain trustees in fee-simple for the public worship and service of Almighty God therein; and that the said chapel and premises belonging to the same were on or about the 25th of March, 1779, conveyed to the defendant Godfrey Kettle in fee-simple for the purpose of securing the repayment of 1,000*l.* and interest; which principal sum had been previously advanced by the Reverend Theophilus Lindsay upon the security of the said premises, and for whose benefit Godfrey Kettle was a trustee.

They admit, that on or about the 6th of December, 1781, the sum of 113*l.* 10*s.*, part of the said sum of 1,000*l.* was paid off and discharged; and that the sum of 886*l.* 10*s.*, being the remainder of the said sum of 1,000*l.*, was paid off and discharged on or before the 19th of March, 1785, by a donation by one Mr. Brooksbank;

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and that the same premises were reconveyed by the defendant Kettle by the direction of Theophilus Lindsay to the persons, who were at that time trustees of the chapel; and they say, the said mortgage was so paid off and discharged in the life of the testator and before the date and execution of his will.

The bill stated, that the Academical Institution mentioned in the codicil was formed for teaching and promoting certain religious tenets and sentiments; which differ from the established religion; that certain lands at Hackney were vested in trustees for the purposes of the said institution; and part of the institution was, that it should be for ever carried on upon the said premises. The bill then suggested, that at the death of Elizabeth Brown the institution had ceased: but upon the answers of the trustees this part of the bill was given up.

The questions were, first, whether the legacy to the Essex-street Chapel was void within the statute: †

Secondly, if the legacy was not void by the statute, whether,

[*421] the express purpose of it having been satisfied by other *means, that institution could have the benefit of it for any other purpose: * *

Mr. Owen, for the plaintiff, and *Mr. Richards*, for the defendant Messer, the other residuary legatee:

The question upon the statute seems so clear, that it is scarcely possible to argue it without hearing what can be said in support of the legacy. It cannot be distinguished from a bequest of a term for years, or a direction to the trustees to purchase a term for years. In *Widmore* v. *The Governors of Queen Anne's Bounty*, 1 Bro. C. C. 13, 33, n. the legacy was held void upon the ground, that now by the regulations, that corporation has made, everything given to them must be laid out in land. There is no difference between giving a mortgage to a charity and giving a sum of money to be laid out upon a mortgage. There is an apparent distinction between this case and those, in which gifts of money to be laid out upon land already in mortmain have been sustained; as where money is bequeathed to beautify or repair a chapel already erected.

† 9 Geo. II. c. 36.

Upon the second question, supposing this legacy not void by the statute, the mortgage having been paid off, and therefore the object of the legacy not being in existence, it is adeemed; like a legacy of a horse, which does not exist at the death of the testator. The particular object cannot now be answered. There is no such incumbrance to be removed. The legacy is given only for the special purpose of paying off that incumbrance, not for the general purposes of the institution. There is no intimation of an intention to give them this legacy, in case the mortgage was removed. If a legacy is given for the purpose of building a church, and they will not take it for that purpose, the legacy is gone: *Attorney-General* v. *The Bishop of Oxford.*†

There is no general charitable intention, under which the Crown can have a right to appoint; the particular purpose having failed. It may be doubtful, whether this institution is a charity. It is to support a chapel, in which are to be received such persons as choose to attend their mode of worship, differing from the established church. Is that a charity; and shall this fund go as a *sum devoted generally to charitable purposes, and [*422] to be applied by the Crown? The particular object has failed: there is no intimation of any other; and there is no general charitable purpose. * * *

Mr. Piggott and *Mr. Romilly*, for the trustees of the Essex-street Chapel, defendants:

This is undoubtedly a charitable purpose: *Attorney-General* v. *Cock*, 2 Ves. Sen. 273.

As to the objection upon the statute, this is an interest in land already in mortmain. Therefore it does not fall within the authorities, that a mortgage, or a lease, or a rent, is within the statute. That only holds, where the land is not already in mortmain: but you may lay out money upon land already in mortmain. It was not the object of the statute to prevent land already in mortmain from being improved. The object was to prevent new land from being brought into mortmain. * * *

† 1 Bro. C. C. 444, n. See the end of that cause stated in the judgment, from the Register's Book, *post*, p. 262.

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[423]

Upon the second point, this disposition was intended substantially for the benefit of the chapel. The application of the money is directed to that, which the testator might think the most urgent purpose: but the existence of the mortgage is not of the essence of the gift. The gift is to the trustees. The application is to be by them, not by the executors. It would be a singular construction, that because the testator has pointed out the mode, in which he wished this legacy, intended substantially as a benefit to the chapel, to be applied, that should be turned into a condition precedent in a Court of Justice, which is favourable to charities. The direction to apply the money distinguishes between the object and the mode: a distinction frequently laid down by Lord THURLOW. The object was the chapel. The application directed was only the mode; that, which the testator thought the best application for the benefit of that object. * * *

[*Mr. Owen* in reply.]

MASTER OF THE ROLLS:

[427]

The question as to the legacy of 500*l.* under this will is, whether under the late statute* or on account of the nature of the application of the money to the particular purpose therein mentioned it is good or void.

It is insisted, that, this being in its nature a charitable use, the bequest of this money to be applied in redemption of the mortgage is within the statute of mortmain, commonly so called, but very improperly; for it does not prevent the alienation, of land in mortmain: nor was that the object of the Act. It has nothing to do with that. The object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest, for any charitable use whatsoever.

It is likewise insisted, that if this legacy is not void under that statute, inasmuch as at the death of the testator the mortgage was paid off, and therefore that object cannot now be attained, it is not applicable to any other purpose for the

* 9 Geo. II. c. 36.

benefit of that society; and as the object pointed out by the will cannot arise, the fund will belong to the residuary legatees. I am in their favour upon both points: but it is not necessary to dwell long upon the second, if I am right upon the first.

It was insisted, and with success, that though the construction of this statute has been extremely rigorous, and many determinations upon it have been thought to carry it even beyond what the legislature had in contemplation at the time; as, for instance, when part of the residue given to a charity consists of mortgages or other securities upon land, though it was held, that it was not an immediate gift of an interest in land, being only what should remain after the debts were paid, and it was melted into money, it was determined, that, as to so much of the residue as consisted of securities upon land, the charity could not take any part of the residue so constituted; yet there have been repeated determinations, that it is competent to a testator, though not to give directly *any interest in land to a [*428] charitable use, to leave a sum of money for the purpose of meliorating, as it is called, any land, or for beautifying, sustaining, or repairing, buildings, already vested in trustees for charitable uses: and no doubt, I believe, is now entertained upon it: and many cases have been determined upon the distinction, whether it is clear, the testator meant the money to be applied in erecting, sustaining or repairing, buildings upon land already vested in trustees for charitable uses, or had any object of having fresh land purchased for that purpose.

It is said this case is analogous to those cases, in which the Court has established in favour of a charity a disposition, not of an interest in land, or of a sum of money bequeathed for the purchase of any interest in land, but for the purpose of meliorating an estate already vested in trustees for charitable uses. I am of opinion, that cannot be considered as the true construction of this gift. The words of the statute, which goes far beyond the title, are very express. It is called an Act to restrain the disposition of lands, whereby the same become unalienable. It then recites, that gifts or alienations of lands, tenements, or hereditaments, in mortmain are restrained by Magna Charta and other laws as against the common utility;

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nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions to uses, called charitable uses (not dispositions in mortmain); and the first clause enacts, that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be conveyed or settled to or upon any person or persons bodies politic or corporate, (that is the only case, in which it could be in mortmain,) or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, &c. of any such lands, &c. money, or personal estate, (other than stocks in the public funds,) be made by deed indented sealed and delivered in the presence of two witnesses twelve months before the death of the donor or grantor and enrolled in the Court of Chancery within six months after execution; and unless such *stocks be transferred six months before the death of such donor or grantor, and unless the same be made to take effect in possession for the charitable use intended immediately, and be without any power of revocation, &c.; and also subject to the provision by the second clause in favour of purchasers *bonâ fide* for valuable consideration.

[*429]

The third clause enacts, that all gifts, grants, conveyances, &c. of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, made in any other manner than by the Act is directed, shall be absolutely void.

Upon the third clause this question arises; whether this

is, or is not, a legacy to be applied in the purchase of an interest in land, or a charge or incumbrance affecting the same. I am of opinion, this is directly in words given for that purpose. Without all question, unless the other argument is resorted to, it is a direction to apply this money in the purchase of that interest then affecting those premises. But it is said, those premises were already appropriated to the same use, for which this mortgage was to be redeemed; and it is farther insisted, that if the testator had been himself the mortgagee, and had directly given the mortgage by his will to these trustees having the equity of redemption, it is something like beautifying, sustaining, or repairing, buildings, money given to be laid out upon land already vested in trustees for a charitable use: but I deny that. The land was never given to that charitable purpose. This is an interest in the land never given to that purpose. They had all the estate but this mortgage interest; and the purpose was to give those trustees, who had the estate subject to this interest, which is in other persons, a larger and more extensive interest than they had before. I am of opinion, it is within the statute. It is nothing but a sum of money given for the purpose of procuring first, and then conveying to the trustees this farther, greater, and more extensive, interest *than they had before. I should be sorry to refine upon the [*430] statute, or to be more rigorous in the construction than former decisions warrant: not that I wish to defeat the statute; but I wish fairly to construe it. The Court has not gone so far as to hold, that a sum of money secured upon turnpike tolls is an interest in land within the Act. This is not like the case of a building. It is very unfortunate, that the testator in such a case should have taken this method of giving *it; [*431] for he might have done it in a more direct way; and I am aware, that all these refinements upon the statute are not using it for the purpose, for which it was intended. If a man devises his lands to be sold, and directs the money to be applied to a charitable use, the statute says, it is void. I put a case, the answer to which I expected. It is said, that if the trustee for a charity has got any interest in land, the increasing that interest or applying money by will to make it good is not an

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interest in land within the statute. I put the case of a trustee having contracted for the purchase of an estate, and money being left to enable him to complete that purchase. The counsel for the charity could not say, that would not be within the statute. Suppose, a part of the money was paid, and part not: if the whole could not be applied, no part could. Where is the difference? Till the mortgage was paid off, the trustees had not that purchase. I am therefore of opinion, that this sum of money bequeathed to redeem the mortgage upon this chapel is void by the statute.

If I am right upon that point, perhaps the other consideration is immaterial: but, as the point was made, I will say a few words upon it, for the purpose of having *The Attorney-General* v. *The Bishop of Oxford*, which has been mistaken, perfectly understood.

It is said, supposing this legacy is not void by the statute, it is not so confined to the purpose of paying off the mortgage, as that, in case that was paid off without the knowledge of the testator, I may not infer an intention, under which it may be applied to other beneficial purposes for this society. I confess, the inclination of my opinion is otherwise. The true question is, can any intention be collected beyond that of securing to them the enjoyment of this building; any intention, that, after having provided for that object, if the whole was not necessary for that, the surplus should be applied for any other beneficial purpose in favour of the society? I am of opinion, no such intention can be collected. I will not say, that, if this legacy was not void by the statute, it might not be applied to sustaining and repairing that building: but that it can be applied to any other purpose, I deny, if *The Attorney-General* v. *The Bishop of Oxford* is right.

The first decree in that cause was made upon the 13th of July, 1786; and is in the Register's Book, A. 1785. The decree by the Lords Commissioners in 1792 is in the Register's Book, 611.

[*432] The *testator after giving to his executors 100*l.* each for their trouble gave and bequeathed the rest and residue of his personal estate upon trust "to build a church at Wheatley, where the chapel now is, in such manner as I shall hereafter direct, or for want of such direction, as my executors shall think fit."

The Bishop of Oxford, who was patron and parson of Cuddesden, in which Wheatley was, opposed the design of building a church; and it was proposed by the defendants, that the salary of the chaplain should be increased. The next of kin insisted, that a new church must be built; and that the surplus belonged to them. By the first decree it was referred to the Master to take the accounts; and it was directed, that the defendants, the Bishop of Oxford, &c. do signify, whether they are willing that the residue of the testator's personal estate shall be laid out in building a church at Wheatley, where the chapel now stands; with liberty to lay a plan before the Master, how the said residue may be most beneficially applied according to the will of the testator.

Before the cause came on again many transactions had taken place. The next of kin, and the persons entitled to the benefit under the will, the parishioners acting by the Bishop and their wardens, came to an agreement, that 3,000*l.*, part of the residue of the testator's personal estate, should be applied for the purpose of building a new church and forming a fund for keeping it in repair, and that 1,000*l.*, other part thereof, should be applied towards augmenting the minister's salary; and 4,000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. This agreement is recited in the decree; and by consent it was ordered, that the sum of 4,000*l.* being paid for the purposes aforesaid, the residue be paid to the next of kin.

This decree is completely decisive, that, the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The Court could not have made the decree, unless they thought, the residue was not applicable to any other charitable purpose. I will not say, it could not have been applied, for repairing or sustaining the chapel; and I doubt whether Lord KENYON said so: but beyond that purpose, or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable to any other general charitable purpose *or any other purpose for the benefit of that parish, except of the nature pointed out, that decree could not have been justified. [*433]

If therefore this legacy was not void upon the statute, I should

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pause upon the question, whether I could apply it to any other purpose. I see, the testator intended it to provide for these persons a place of worship. I see no other intention; and I think, I could not apply it to increase the salary of the ministers or for any other purpose. In looking over these cases, understanding, that the question, how far a legacy given to a charitable purpose may be applied to any other purpose than that specified, is now depending before the Lord CHANCELLOR in *The Attorney-General* v. *Andrew* (*ante*, p. 110), I find, that in *Moggridge* v. *Thackwell* (2 R. R. 140), Lord THURLOW makes this observation:

"*Baxter's* case was very strong; and perhaps would not now be followed. The legacy was deemed to be void, because for forbidden uses; and yet the Court thought, that as it was declared to be for charity, it should go to charities to be declared by the Court. I do not mean to state that as an authority; for it is very hard indeed, that the Court should give it to other charities, because those, which were mentioned, could not take."

[434] I confess, I very much agree with this doctrine.

Declare this legacy of 500*l.* void under the Statute 9 Geo. II.

* * *

1799.
March 7, 13.

TOLSON *v.* COLLINS.

(4 Vesey, 483—492.)

ARDEN, M.R., for the LORD CHANCELLOR.

[483]

As to a presumed satisfaction of a debt by a legacy there is no distinction between the cases of parent and child and of strangers; therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of satisfaction.

Portion by will *primâ facie* a satisfaction of a portion by settlement.

MARY POWELL by her will, dated the 16th of August, 1783, gave and bequeathed unto John Collins, his executors and administrators, the full sum of 800*l.* sterling, a part of her money in the public funds, upon trust, that he and they should continue the same there or elsewhere at interest for the equal benefit of Jane Collins, John Collins, Ann Collins, and Bonner Collins, children of the said John Collins, until they should attain their respective age or ages of twenty-one years, or day or days of marriage, which should first happen; and then to pay and

equally divide the same between them share and share alike; to wit, 200*l*. a-piece to each of them at the respective times aforesaid, together with the dividends or interest, profits, and produce, of each one's legacy in the mean time accruing; and in case any or either of them, the said Jane, John, Ann, and Bonner, should happen to die before his, her, or their, respective age or ages of twenty one years, the testatrix gave the share or shares of him, her, or them, so dying over to the survivors or survivor of them, to be equally divided between them, if more than one, share and share alike; and if there should be but one, wholly to such survivor, to be paid at the respective times or time aforesaid; and she appointed John Collins the elder and Samuel Alford executors.

The testatrix died in July, 1787.

John Collins, the elder, received the sum of 800*l*. under the trust in the will. He died upon the 5th of May, 1792; leaving all the children mentioned in the will of Mrs. Powell, and another son, Henry Collins, surviving.

[484]

By his will, dated the 23rd of January, 1790, reciting his marriage settlement, under which he had a power to appoint the estates settled upon the marriage after the deaths of himself and his wife among his children, or to any one child, and subject to such charges as he should think fit, he appointed under that power a part of the estates after the deaths of himself and wife to his youngest son Bonner Collins, his heirs and assigns for ever. Then all the rest of the estates, subject and chargeable with the several legacies and sums of money for his sons and daughters after mentioned, he gave to his eldest son and the heirs male of his body; and, for want of such issue, to his second, third, and every other son, successively in the same manner; and, for want of such issue, to his daughters, equally, as tenants in common, and their respective heirs and assigns; and he charged all the said estates, except the part appointed to Bonner Collins, with several sums given to each of his sons and daughters; viz. to Jane Collins and some others 2,500*l*., and to the rest 2,000*l*.; directing, that if either of his sons or daughters should die under the age of twenty-one, the sum of money charged for such son or daughter so dying should

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sink into the estate. The testator then imposed a condition upon his eldest son to confirm a contract, into which he had entered for the sale of part of the estate; and gave to his son Henry some lands, to which he directs his eldest son to make a complete title. He then gave all other his real estates, subject to certain trusts, to the use of his sons successively in tail; with remainder to his daughters.

The testator also gave and bequeathed to his daughter Jane Collins the sum of 500*l.*, to be paid to her at her arrival to the age of twenty-one years, if she should arrive to that age, but not otherwise, together with the interest in the mean time for her maintenance and education at the rate of 4*l.* per cent. per annum, to be paid as therein mentioned.

The testator gave similar legacies to his other children; and he gave all the residue of his personal estate upon trust to be called in and turned into money, and applied in payment of his debts and legacies; and he directed the deficiency of his personal estate to be paid out of his real estate. The testator appointed his wife Jane Collins and several other persons executors of his will.

[485] The bill was filed by Jane Collins, the daughter, who had attained the age of twenty-one, and her husband, claiming the legacy of 200*l.* under the will of Mary Powell.

The question was, whether the plaintiffs must not elect to take the legacy of 200*l.* under the will of Mary Powell, or the provision under the will of John Collins?

Mr. Mansfield, for the plaintiffs:

Contended, that they were clearly entitled both to the legacy of 500*l.* under the will of the testator John Collins and to the sum of 200*l.* under the will of Mrs. Powell; which was a debt due by Collins; who by his will expressly directed his debts to be paid; and shewed no intention, that the legacy of 500*l.* should be a satisfaction: the other provisions being out of the case, as depending upon the settlement.

Solicitor-General and *Mr. Cooke*, for the defendants:

The cases have decided this; that where the testator has mixed

trust funds with the mass of his own property, and has then made a disposition in favour of his children, and they can make a claim upon his property in respect of those trust funds, the disposition made in favour of his children is *primâ facie* to be considered as in satisfaction of those demands. A presumption arises; and it is necessary, for those claiming against the disposition he makes, to rebut that presumption. It is extremely important not to disturb that range of cases. * * * [They cited *Hinchcliffe* v. *Hinchcliffe* (*ante*, p. 89); *Copley* v. *Copley*, 1 P. Wms. 147; *Walpole* v. *Lord Conway*, 3 Barnard. 153.]

Mr. Mansfield, in reply:

I admit, small differences in the time of payment, &c. where [489] the question arises upon two portions, falling from the same parent, and out of the same fund, will not prevent a satisfaction: whether it arises upon a contract for a settlement, satisfied by a will, or upon a portion by will, satisfied by advancement: first, from regard to the convenience of the estate: secondly, because it is unnatural to suppose, that a man should intend to give two portions, giving one plainly, in a manner shewing, he means it as a portion. But where the question is, whether a legacy is a satisfaction of a debt, the rule is clear, that if there is a difference in the time of payment or other circumstances, there is no satisfaction. * * * But in this will there is an *express [*490] direction to pay the debts and legacies. Where a parent owes a clear debt to his children, and gives legacies to them, or makes a provision for them by will not payable at the same time, and differing as to circumstances, there is no more a satisfaction than in the case of a stranger. The interest in the 200*l.* under the will of Mrs. Powell is more valuable than the contingent legacy of 500*l.* * * *

MASTER OF THE ROLLS:

Whatever may be the conjecture as to what this testator did intend, the single question is, whether by any rule, that has prevailed with regard to a debt due from a parent to a child and a bequest to that child by his will, this can be considered as a satisfaction of the debt admitted to be due by the testator to these four children?

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I am very glad this case has been so fully argued; and that the counsel for the defendant have taken the trouble of looking into almost every case, in any respect similar to it: but there is not one case, in which it has ever been established, that a legacy given by the will of a parent is upon any different footing from that of a legacy by any other person as to the satisfaction of a debt. I rather think, a parent giving to his children a provision by his will means that to be all they are to demand from him by way of portion, or otherwise: but there is no one case, in which that has been adopted. In *Hinchcliffe* v. *Hinchcliffe* (*ante*, p. 89); and *Walpole* v. *Lord Conway* (3 Barnard. 153), there were two circumstances: First, it was perfectly clear, the testator
[*491] meant that the property claimed under the settlement *should be considered as part of his personal estate; and consequently the children were put to their election: but, besides that, they were questions of double portions; and I admit, that where by the settlement out of the common fund a provision is made for the children of the marriage, and the parent has given by will as a portion any part of his property, *primâ facie* that given by the will is a satisfaction of that by the settlement. But I never heard, that a debt due by a father to a child was satisfied by a legacy given by the will of the father; and that the child could not take both; and I do not apprehend, there is any such principle: such a debt is no more satisfied by such a legacy than a debt due by a stranger is satisfied by a legacy under his will, unless upon the face of the will, or from the circumstances as to the manner, in which the testator acted upon the property, it can be plainly proved, he meant it so. It is admitted, that if this had been the case of an uncle, or any other person, not in the situation of a parent, it would not be a satisfaction; and, however desirous I am of availing myself of any rule in favour of the intention, I must not lay down a new rule, carrying the doctrine much farther than it ever has been carried. No case has been found of a debt so satisfied. If the case of a debt could be found, the industry, that has been exerted, would have produced it, instead of cases upon provisions in the nature of a portion. This case therefore is perfectly free from all the doctrine that has prevailed as to double portions.

It is said, that, when this testator made his will, he gave

these children a greater benefit than they would have derived under the debt. But it is admitted, that it is not such a benefit as in the case of any one but a parent would have been a satisfaction. I must then have recourse to the will. If I am to conjecture upon it, I should imagine, the testator did not mean these children to have both demands: but is there any principle, upon which I can hold the one a satisfaction of the other? If any of these children had come of age in the testator's life, am I to suppose a satisfaction intended as to them? *Did he mean them to wait till his death? It can hardly be supposed. [*492]

TOLSON v. COLLINS.

I am very far from differing from *Hinchcliffe* v. *Hinchcliffe*. On the contrary, I think it is confirmed by all the cases that have been cited. But I decide upon this; that this is not the case of a portion; and I lay down generally, that a legacy by a father to a child is not a satisfaction of a debt due to the child in any other way than a debt due from a stranger would be satisfied by such a legacy. I must try it by the same rule; and see, whether it appears by the will, that he considered it as part of his personal estate; and it is admitted, that if this was the case of a stranger, this legacy would not be a satisfaction. Therefore I must hold, that this legacy is due to the plaintiff.

FORREST *v.* ELWES.†

(4 Vesey, 492—498.)

1799.
March 15.

ARDEN, M.R., for the LORD CHANCELLOR [492]

Transfer of stock by way of loan upon bond, with condition to replace the stock six months after the date, and in the meantime to pay interest at five per cent. The stock not being replaced, and being depreciated, the obligee is entitled to the value of the stock at the time of the transfer, with interest at five per cent. to the date of the report; credit being given for some payments on account of the principal.

In the year 1766 Commodore Forrest having applied to Mr. Elwes for a loan of 7,000*l.* or 8,000*l.*, Mr. Elwes agreed to transfer to him 8,000*l.* Old South-Sea Annuities; which upon the 30th of August, 1766, the day of the transfer, were of the value of 7,170*l.* Upon that occasion a bond was entered into by Commodore Forrest, dated the 30th of August, 1766; the

† *Blyth* v. *Carpenter* (1866) L. R. 2 Eq. 501, 35 L. J. Ch. 823.

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condition of which was, "that if the said Arthur Forrest shall replace or transfer unto the aforesaid John Elwes, his executors, administrators, or assigns, in the books of the South-Sea House 8,000*l.* capital stock in Old South-Sea Annuities six months after the date hereof, and shall in the meantime pay or cause to be paid lawful interest upon 7,170*l.* to the said John Elwes, his heirs, executors, administrators or assigns, being the produce of the above Old South-Sea Annuities this day sold and transferred by the said John Elwes to the said Arthur Forrest at 89⅝," then the obligation was to be void.

By the decree made in this cause the will of Commodore Forrest was established; and the accounts were directed.

[493] By the decree made in the supplemental cause upon the 14th of July, 1795, it was declared, that what should be coming due to the estate of the testator Forrest upon the account of Willis, one of the trustees in the will, who had become a bankrupt, should be answered by the defendants, the representatives of Elwes; who was another of the trustees in the will of Forrest; and who was charged in respect of a loss sustained by the estate in consequence of consignments by his permission to Willis; and it was directed, that the balance due from Elwes should be paid by the said defendants.

An account was also directed to be taken of what was due from the testator Forrest in respect of the bond-debt to Elwes.

By the Master's report, dated the 21st of July, 1798, the estate of Elwes was charged with the sum of 10,562*l.* 19*s.* 5*d.* due to the estate of Forrest on account of Willis: and it was stated, that there remained due from the estate of Forrest to the estate of Elwes on account of the said bond for principal the sum of 6,500*l.* and for interest thereon, computed to the date of the report, the sum of 6,463*l.* 17*s.* making together the sum of 12,963*l.* 17*s.*; leaving a balance of 2,400*l.* 17*s.* 7*d.* due to the estate of Elwes from the estate of Forrest.

To this report the following exceptions were taken:

First, that the bond was upon the face of it entered into upon an usurious contract:

Secondly, that the Master had computed interest upon the sum of 6,500*l.*, the principal money alleged to remain due upon

the bond, after giving credit for payments made on account of the principal, after the rate of 5*l.* per. cent. per annum to the date of his report: whereas, admitting the legality of the bond, the Master ought not to have made any computation of interest upon any money secured thereby, but to have taken an account of the dividends, which would have accrued upon the sum of 8,000*l.* Old South-Sea Annuities from the date of the bond to the date of the report, and to have charged the estate of Forrest with the amount thereof, after deducting the several sums paid on account of such interest and dividends:

Thirdly, that the Master has certified, that there remained due from the estate of Forrest to the estate of Elwes the sum of 6,500*l.* for principal upon the said bond, after giving credit for the payments made on account of such principal, and upon the supposition, that such principal money was originally the sum of 7,170*l.*; whereas no sum was made payable or secured to be paid by the bond: the condition being for replacing the capital or principal sum of 8,000*l.* South-Sea Stock with interest, as therein mentioned; and therefore the estate of Forrest ought to be charged only with such sum of money as or by way of principal as will be sufficient for repurchasing or replacing the said principal sum of 8,000*l.* South-Sea Annuities, when the same may be so repurchased, or at some given period of time, after deducting the several sums of money paid on account of the bond. [494]

The first exception was given up by the plaintiffs.

Attorney-General and *Mr. Stanley*, in support of the exceptions:

This is a very singular bond. It is difficult to insist upon its being usurious; and I must admit 5*l.* per cent. must be paid for some period. But the Master has conceived, that after the expiration of six months this bond became a security, not for replacing the stock, but for repayment of the principal money. The true result of the contract is, that 5*l.* per cent. ought to be paid for six months from the date of the bond; that then that act, which the obligee had a right to have done at the end of the six months, ought to be considered as done; and that by paying

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interest at the rate of 5*l.* per cent. to the end of the six months, replacing the stock, and paying the amount of the dividends, that would have accrued from the end of the six months, till the stock is replaced, the account will be properly settled.

The next proposition, which is the ground of the third exception, if the second fails, is, that this bond never can be a money bond; and the utmost, that can be insisted upon by the defendants, is, that upon now replacing this sum of 8,000*l.* Old South-Sea Annuities and paying interest upon the sum of 7,170*l.* at the rate of 5*l.* per cent. from the date of the bond to the time of replacing the stock it will be right. If the stock had risen above par in the course of the six months, Mr. Elwes could have filed a bill at the end of that period, insisting upon a re-transfer; [*495] which *would have put the rise in his pocket. If that is so, the converse follows; and, if the stock falls, he must bear the loss. It is the risk, with reference to which he makes the contract. It can only be considered as not an usurious bargain in respect of that contingency; that interest at the rate of 5*l.* per cent. being paid to the end of the six months, Mr. Elwes would then have a right to a re-transfer, though the stock had risen, merely because he was subject to the risk of the stocks lowering. The whole he bargained for was, that if interest at 5*l.* per cent. was paid till the stock was restored, supposing the stock was not restored at the end of six months, yet he was bound to receive the interest, till the stock was restored, and the stock itself, when offered to be restored. It was very easy for him to make the contract in the other way, if it was so intended; and then the condition would have been to pay interest at 5*l.* per cent., till the stock was to be restored, and, if it was not restored at the time to pay the sum of 7,170*l.* with interest at 5*l.* per cent. But the bond is not in the common form. It does not speak of the payment of a principal sum of money at the period mentioned, but of the transfer of stock, and of that only. There was no period, at which Mr. Elwes could have called for the payment of any principal sum of money.

Mr. Mansfield and *Mr. Hart*, for the report:

This bargain, to which these objections are taken, is nothing

more than to take interest at the rate of 5*l.* per cent. upon money lent on bond. What is there unreasonable in the transaction? The lender sold out stock to raise the money. Instead of stipulating for a return of that identical sum, for which the stock was sold, he requires so much stock to be replaced at the end of six months. If the stock had been offered at that time, the condition would have been satisfied. No doubt the obligation was mutual; upon the one, to transfer the stock; upon the other, to accept it. But does it follow, that at any future time the debtor may relieve himself by offering to transfer stock, when not of half the value? The mutuality was gone at the end of the six months by the breach of the condition by not transferring stock at that time; and that condition, which ought to have been fulfilled at the end of six months, not being complied with for thirty-three years, the money, the value of the stock lent, is to be repaid. The loan was in time of peace, when probably the stocks were high. A few years ago it would have been insisted, that the money was to be repaid. *The penalty of the bond is the debt at law; from which they could have been relieved only upon fair terms. Part of the money has been repaid; in what manner, does not appear. The conduct of the parties therefore shews, that the principal sum advanced was the sum due. [*496]

Neither is there any ground to stop the computation of interest at the rate of 5*l.* per cent. at the end of the six months. The debtor was then bound to transfer stock. It would be singular, if breaking the condition of the bond he was therefore to be liable to pay less interest. The sense of the condition is, that the interest to be paid is 5*l.* per cent. upon the principal sum.

Attorney-General, in reply:

If an action had been brought upon this bond, or if an issue, *quantum damnificatus*, had been directed; it would depend upon the question, whether the true meaning of it is not a contract to do a particular act. If it is not to be considered as done at the end of the six months, when it ought to have been done, the Court will at least relieve upon the terms of making compensation for the damage. This is not the usual form of a bond, by

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which money is to be repaid, or stock to be restored. It is to restore a given quantity of stock at a given day; and there is nothing compelling the obligor either to pay money or restore stock on any future day. I must admit, that if 7,170*l.* had been tendered before the end of the six months, and that sum was not equal to replacing the stock, Elwes was not bound to receive it. An ordinary bond does not express, that the money is to be paid upon any future day: but the law says, it shall be a bond for the payment upon any future day.

As to the construction of the parties, some consignee paid a sum of money to Elwes. Under what circumstances that payment was made is not known. If therefore it turns upon that, there must be an inquiry.

MASTER OF THE ROLLS:

The real question is, whatever has been the Master's idea, whether what he has given as a compensation for the breach of the condition is a fair and reasonable mode of computing the injury sustained?

[497] This is in fact a bond for performance of an agreement. Had not Mr. Elwes a right to take it into a court of equity, if he thought fit? Is there anything unreasonable in it? In the year 1766 he advanced the sum of 7,170*l.* to Commodore Forrest; who in consideration of that sum paid to him undertakes to transfer upon a given day a given quantity of stock; which is neither more nor less than so many annuities redeemable by the public; and he agreed to pay interest at the rate of 5*l.* per cent. upon the sum advanced in the mean time; and for performance of this agreement he gives a bond with a penalty of double the value of the money. He did not perform his agreement. The consequence is, that at law the penalty is forfeited. It does not appear, whether either the stock or the money was ever demanded: but some sums of money have been paid: it is not known, when, or by whom: but by some means or other a gross sum has been paid; which has left a balance remaining of only 6,500*l.* The distinct question is, what is the fair measure of the damage. Should I do justice in giving the same annuities, which were then worth more than 89 per cent., and are now

much depreciated? It would be ridiculous to state that as a compensation. Suppose an engagement entered into to deliver a ship at a certain day in time of war, and the offer is made afterwards, when the war is over: the ship might not be so good then; and the object, for which it is wanted, might not exist. Suppose, a trustee sells out stock: what is the habit of the Court as to compensation? The *cestui que trust* has an option to have either the stock, or the money produced by it with interest. Why shall not the same option be given to the obligee in this bond; who has suffered by the breach of this agreement? It is certainly not unjust; nor do I know a more moderate compensation for a breach of the agreement by the party with his eyes open than giving back the money with interest. It is no more than if it had been a loan. I admit, it is not a loan: but the defendants say, they are willing to accept the money with interest. The Master has thought that fair; and I do not know how a jury could adopt a better rule. If an action had been brought recently upon *the breach of the agreement, and the stock had risen; no doubt, the jury would by way of damages have given the rise, and would not have confined it. That would be injustice the other way. The regular way would be an issue, *quantum damnificatus;* upon which the Judge would say, they might have demanded more, and cannot have less. It is a fair compensation upon the whole. [*498]

The exceptions were overruled.

1799.
April 12, 15.
1800.
Feb. 8.

LOUGHBOROUGH, L.C.

[501]

LUDERS *v.* ANSTEY.*

(4 Vesey, 501—515; 5 Vesey, 217.)

Settlement decreed according to a letter previous to the marriage; though no express assent: the marriage having taken place immediately, a distinct, positive, dissent would be necessary to prevent the effect of the letter: and that could be evidenced only by an actual settlement before marriage.

Construction of an inaccurate letter, the basis of a settlement, as to the rights of the parties, and as to the subject, upon which the settlement was intended to attach.

By indentures, dated the 10th of July, 1776, previous to the marriage of William Light and Lucretia Luders, the fortune of Lucretia Luders, amounting to the sum of 3,000*l.* was vested in trustees, upon trust after the marriage to permit William Light and his assigns to receive the interest during his life; and after his decease to permit the said Lucretia and her assigns to receive the interest during her life; and after the death of the survivor in trust for the children of the marriage, as therein mentioned; and in consideration of the said settlement of the sum of 3,000*l.* and for making a further provision for the said Lucretia, it was declared, that in case the marriage should take effect, and the said Lucretia should survive William Light, she would be entitled to dower at common law out of his real and personal estate; and if she should survive him, she should receive 14,000*l.* at least within six months after his decease as and for her share of his personal property; and for the better securing the same William Light covenanted, that if the share of his personal estate in England at the time of his death, which the said Lucretia should be entitled to receive, should not, when reduced into money, amount to 14,000*l.*, then his heirs, executors or administrators, should within six months after his decease pay to her so much money as with what she would be entitled to receive as her share of his personal estate in England would make up the full sum of 14,000*l.*; and it was declared, that the said covenant should not be construed to confine her share of his personal estate to the sum of 14,000*l.*, or to prevent her receiving any larger sum, in

* *Alderson* v. *Maddison* (1880) 5 Ex. D. 293, 299, 49 L. J. Ex. 801.

case her share in such personalty (whether in England at the time of his decease, or afterwards remitted), as his widow, should appear to amount to any larger sum: but only to secure to her in all events *the said sum of 14,000*l.* within six months after his decease: and in case his personal property, which should be in England at his death, should not be sufficient to afford the said sum of 14,000*l.* as her share, his heirs, executors, &c. should in pursuance of the covenant be obliged to advance a sum sufficient to make up her share the full sum of 14,000*l.*; and if any other part of his property should afterwards be remitted or come to England from the East Indies, then the said Lucretia, her executors, administrators and assigns, should be entitled to receive her widow's share only out of the surplus of the monies so remitted after a deduction of the money advanced to make up the sum of 14,000*l.*; and it was declared, that any future estate coming to the said Lucretia should be settled upon the same trusts as the said sum of 3,000*l.*

[*502]

William Light died in 1784 intestate; leaving his wife Lucretia and four children by her surviving. His widow took out letters of administration to him.

In November, 1786, a bill was filed by George Stratton on behalf of himself and all other creditors of William Light against his widow and her brother Alexander Luders, one of the trustees in her marriage settlement, who had also acted as agent to his sister in the management of her property; praying an account of the debts; and that the settlement may be declared fraudulent and void as against the creditors.

Lucretia Light by her answer insisted, that the personal estate of William Light remaining in her hands unadministered did not amount to the sum of 14,000*l.*; and that she ought to be considered as a specialty creditor for that sum with interest in preference to the other creditors.

In April, 1791, before any decree was made in that cause, Lucretia Light married Robert Anstey. No settlement was made previously to that marriage: but by bond, dated the 19th of April, 1791, and executed after the marriage, Robert Anstey became bound to Alexander Luders and to John Anstey and Arthur Anstey, brothers of Robert Anstey, in the penal sum of

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10,000*l.*; with a condition, reciting the marriage; and that Robert Anstey was desirous of fulfilling a promise, which he had made to the said Lucretia before his marriage with her, of making some provision for her out of the fortune, to which he had become entitled in right of his *said wife, claiming under William Light, her late husband, or any of the covenants in the settlement made upon her marriage with him, and also for her four children by that marriage, William Stratton Dundas Light, Alexander Whalley Light, Lucretia Light, and Henry Light, upon condition, that they should not receive or claim any part of the estate or effects of their late father from his administratrix under the Statute of Distributions; but the affairs of William Light being then unsettled, and Robert Anstey being then under orders to leave this country immediately to join his regiment in India, he was willing in the meantime to enter into the said bonds, it was declared, that the said bonds should be void, if Robert Anstey, his executors or administrators, should by a proper instrument or instruments pay, assign, or make over, to Alexander Luders, John Anstey, and Arthur Anstey, one full clear moiety or half part of what should appear to be the clear surplus of the estate and effects of the said William Light deceased, not including diamonds, jewels, rings, ornaments of the person, and wearing apparel, after full payment and satisfaction of all the debts, charges, obligations, or other incumbrances, affecting such estate and effects, other than the covenant or covenants in the settlement made upon the said Lucretia by William Light, also after payment and satisfaction or allowance of all costs, damages and expenses, which had at any time before or might at any time after be incurred in any suit or suits either in law or equity already instituted, or which had been or might be instituted, respecting the estate and effects and affairs of the said William Light, whether the same or any part thereof might have been paid by or by the order of the said Lucretia before her said marriage out of her own private money, or might be paid by Robert Anstey hereafter out of his own private money or out of any part of the estate of William Light, and also after payment and satisfaction of every other expense, that might be incurred in the settlement or arrangement of the affairs of the said

[*503]

William Light either in England or elsewhere; upon trust with the consent of Robert Anstey during his life and after his death of Lucretia, his wife, in case she should survive him, to invest the whole amount thereof in government or real securities at interest, and to stand possessed of the stocks, funds or *securities, [*504] upon the trusts after declared: that is to say; upon trust to pay to and empower Robert Anstey and his assigns to receive the interest for his life; and after his death to pay to or empower Lucretia, his wife, in case she should survive him, to receive the same for her life; and after the death of the survivor of them upon trust to pay, assign, or make over, the principal of such stocks or securities equally to and among such of her children by William Light, as should be living, or be married, at the death of the survivor of Robert Anstey and his said wife, or should have been married, and be then dead, leaving a child or children surviving, or born in due time afterwards: but if any of the said children of William Light should die under age, not being married, or having been married and not leaving a child or children surviving, as aforesaid, or born in due time afterwards, then the part of him or her so dying is not to survive to the others or other of them, but to go to their representatives respectively according to the Statute of Distributions; and, if all of the said children should die before the survivor of Robert Anstey and Lucretia, his wife, under age and unmarried, or having been married, without leaving a child or children surviving as aforesaid, or born in due time afterwards, then upon trust to pay, assign, and make over, the said principal unto the survivor of Robert Anstey and Lucretia, his wife, his or her executors, administrators, and assigns; and which said instrument or instruments should contain powers to the trustees for changing the securities, and for the other purposes therein mentioned: and particularly a proviso or condition (as may be most advisable), that before any of the said children, or any persons claiming through them should become entitled to receive any benefit under the bonds and the instruments to be made in pursuance thereof, they and each of them should execute to Robert Anstey, his heirs, executors, and administrators, and to Lucretia, his wife, her heirs, executors, and administrators, in

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case she should survive him, or to such other persons, as should be entitled, general releases, discharging them and the estate of William Light from all claims or demands whatsoever: but such proviso should not be intended or worded so as to deprive any child or children of the said children of William Light (surviving their respective parents) from claiming the interest of the share of their deceased parents during their infancy: but if Robert Anstey at the request of the trustees should not execute such proper instrument agreeably to the condition, the bond was to remain in full force: and it was declared, that no part of the private estate and effects of Robert Anstey (nor the diamonds, [*505] *jewels, paraphernalia, or other articles therein before excepted) should be liable to or bound by the said bonds, but only the full and clear moiety of the surplus of the estate and effects of William Light after full payment, satisfaction and allowance, of all the debts, charges, incumbrances, loss, costs and expenses, therein before expressed, and thereby intended to be paid, satisfied, and allowed thereout.

By the decree, made on the 22nd of July, 1791, in the cause of *Stratton* v. *Anstey*, the bill, so far as it sought to set aside the deed, dated the 10th of July, 1776, was dismissed with costs; and it was referred to the Master to take an account of the debts due to the plaintiffs, and of the personal estate of the intestate William Light come to the hands of Robert Anstey, and his wife, and of Alexander Luders; who by his answer admitted, he had received part; and it was directed, that the personal estate should be applied in payment of the debts and funeral expenses of the intestate in a course of administration.

By deed of release, dated the 22nd of October, 1793, reciting, that Alexander Luders had applied all the personal estate of William Light, that came to his hands, except 680*l.* East India stock, and 700*l.* 4 per cent. Bank Annuities, Robert Anstey and his wife released Luders from all demands in her right, as administratrix of William Light, except the said two sums of 680*l.* and 700*l.* stock; and Robert Anstey agreed to indemnify Luders against all demands on account of the suit of *Stratton* v. *Anstey*; and Luders covenanted, that, as soon as he should be discharged from that suit, he would transfer the said stock to

Robert Anstey: the same having been laid out by him as part of the sum covenanted by William Light to be paid for the benefit of Lucretia Anstey.

Lucretia Anstey died in April, 1794; having had only one child by her second marriage; who died an infant. Robert Anstey took out letters of administration to her; and Alexander Luders obtained letters of administration *de bonis non* of William Light during the minority of his children.

The bill was filed by Alexander Luders and the four infant children of William Light against Robert Anstey and his two brothers; praying an account of all sums of money, securities and other personal estate, which the defendant Robert Anstey had at *any time possessed or received in right of his late wife, and of all [*506] sums of money in the funds, securities, and other personal estate, (except jewels, rings, ornaments of the person, and wearing apparel) in the possession or power of Lucretia Anstey at the time of her marriage with Robert Anstey, which she claimed to be entitled to, or had possessed, or received as administratrix of, or otherwise under, William Light, or as part of his personal estate or the produce thereof; and an account of all the personal estate of William Light, except as aforesaid, received by Robert Anstey and Lucretia, his wife, during such second coverture; and that all such personal estate or the securities, &c. may be transferred to the Accountant-General; and that the property or fortune of the late Lucretia Anstey may be settled according to the terms of a letter dated the 17th of April, 1791, mentioned in the bill: but if it should appear to the Court, that the defendant Robert Anstey is not bound to make a settlement according to the terms of such letter, then that he may be compelled to make a settlement of one moiety of the monies retained by him and Lucretia, his wife, towards satisfaction of the covenant in the settlement, dated the 10th of July, 1776, or which shall hereafter be paid or payable in respect thereof, and also one moiety of the clear residue, if any, of the personal estate and effects of William Light, upon the trusts of the said bonds for the benefit of the infant plaintiffs according to their respective rights and interests therein, and that such farther parts of the residue of the personal estate of William Light, as the plaintiffs,

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the infants, respectively may appear entitled to or interested in, may be applied or secured for their benefit; and that Robert Anstey may be restrained from commencing any action against the plaintiff Luders to compel the transfer of 680*l.* East India stock, and 700*l.* 4 per cent. Bank Annuities.

The bill charged, that it would appear, how much of the personal estate of Light is applicable to the settlement, if the defendant Robert Anstey would account for the personal estate received by him in right of his wife; that the said East India Stock and Bank Annuities form part of the fortune of Lucretia Anstey: and ought to be settled according to the letter of the 17th of April; and that the defendant had received other parts of her fortune to a much greater amount than he is entitled to; [*507] and therefore the *dividends of the said stock ought to be secured for the benefit of the infant plaintiffs.

There being no evidence in the cause, it rested upon the answers of Robert Anstey and Arthur Anstey. The LORD CHANCELLOR said, he should consider the latter as if he had been examined as a witness.

The letter represented by the bill as the proper basis of the settlement was written by Robert Anstey from London to Lucretia Light at Bath; and was dated Sunday the 17th of April, 1791. It appeared to be in answer to objections, that had been made by Mrs. Light to Mr. Anstey's proposals of marriage on account of the difference of their ages, and of her children, and the danger of leaving them unprovided. Mr. Anstey in that letter disclaims all idea of her fortune; declaring, that he only wishes to call her his previously to his then intended departure for India. He represents, that his allowance, while he remains there, will be near 1,000*l* per annum; so that she in no respect need curtail her expenses during his absence; that at his return he shall have between 3 and 400*l.* a-year. The letter then proceeds thus:

"In case of an addition to your family afterwards I have proposed that one-third of your fortune should go to them; secure one to your present children: should the number of the latter be more than your former, divide the two-thirds in such a manner as to make all equal; and in the event of our death divide

the other third amongst them all. One third with the addition of my own income and what my father will give me, which considering the number of his children will be handsome, I am confident we shall be able to live on very comfortably and as much to your happiness and pleasure as at present: "

Then adverting to an avowal she had made in a letter to him, that did fortune permit her to do it, she would make a determination in his favour, he asks, "Why will it not? Consider the proposals I have made above. I am convinced you will find it will."

Robert Anstey was at this time Captain in a regiment serving in the East Indies, and being under orders to join his regiment, and *intending not to marry previously to his departure, he had [*508] taken leave of his friends; and his baggage was on board the ship; which was then in daily expectation of sailing: but finding, there was a probability of a short delay, he went to Bath on the 20th of April for the purpose of marrying Mrs. Light. He arrived there early in the morning of the 21st; when, after they had met, and just before they were going to be married, he sent to his brother Arthur Anstey, requesting a meeting; and upon his coming Robert Anstey mentioned, that he and Lucretia Light were then immediately going to be married; and he requested his brother to accompany them to church for the purpose of giving her away: but Arthur Anstey, as soon as he was informed by Robert Anstey, that his intention of marrying Mrs. Light was unknown to his father and every other part of his family, declined attending them to church; and soon afterwards went away; having first suggested to his brother the propriety of his making some settlement on or provision for his intended wife and her children by her former husband: in answer to which Robert Anstey said, that there was not then time for making a settlement or provision for them: but he assured his brother, that after his marriage and before he should leave England he would make any settlement or provision, which Arthur Anstey should think right and proper; and would do whatever he thought, that as a man of honour he ought to do in that respect.

A few hours after the marriage Captain and Mrs. Anstey and

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Mr. Arthur Anstey went to London; where a negotiation took place between Mr. Arthur Anstey and Mr. Luders; in consequence of which the bond was prepared by the former, who soon returned with his sister-in-law to Bath, in order to arrange her affairs previously to her quitting England; Robert Anstey being either at London or Gravesend.

When the bond was ready, Arthur Anstey and Lucretia Anstey set out from Bath for London. Robert Anstey met them in their way; and being much pressed for time from the apprehension of losing his passage he executed the bond in a carriage on the road.

Robert Anstey by his answer stated, that according to the best of his knowledge, remembrance, and belief, no letter passed
[*509] between *him and his wife, nor did he write any letter to her, previous to his marriage concerning any proposed or intended settlement, except the letter of the 17th of April; that the proposal therein made with respect to a settlement or provision was never assented or agreed to, or even in any manner answered, noticed, or alluded to by her in any of her letters to him from the time of his writing that letter to the time of his executing the bond: nor was the bond made in consequence, pursuance or contemplation of, such letter, nor with any reference thereto: nor was there any promise or agreement relative to a settlement or provision ever made by him and Lucretia, or by him to any one on her behalf, before the marriage.

The answer also stated, that the defendant was willing to settle according to the bond: but the plaintiff insisted, that according to the terms of the bond the defendant is bound to settle a moiety of the fortune of Lucretia Anstey at the time of the death of William Light. The defendant insists, he is bound to settle a moiety of the fortune at the time of his marriage, and not at any other time.

The answer further stated, with reference to the recital in the deed, dated the 22nd of October, 1793, that Lucretia Anstey had for the benefit of her children previously to her marriage with the defendant consented and agreed to take only a life estate in certain sums therein mentioned, and that all the parties thereto were desirous to confirm the said agreement, that no such

agreement was made; and that the said recital appears to the defendant to be an interlineation in the draft; and he cannot conceive any other reason for it, except that the plaintiff Luders might suggest it, in order to guard the settlement of the terms therein mentioned or alluded to from any question that might be made as to its validity against any creditors of the defendant; and he insisted, that these circumstances afford strong presumptive evidence, that the recital in the condition of the bond could only have been inserted with a view to guard the settlement thereby provided against such question.

The answer charged the plaintiff Luders with keeping his sister in the dark as to the account of her fortune and making use of it; *and stated, that he had not given the defendant any [*510] satisfactory account; that Lucretia Anstey frequently declared, she was much dissatisfied, and thought she was worth more: that the release was executed, in order to prevent the plaintiff's departing from a verbal agreement with his sister to take equal interests after the death of their mother in the property which she enjoyed for life, and to avoid any dispute, and to be upon a friendly footing; but not upon a conviction, that the accounts were clear.

The defendant Arthur Anstey by his answer stated, that upon his arrival in London with his brother and sister after the marriage, at her request, and with a view of prevailing upon the plaintiff Luders to see her, and to consult with him respecting the measures, which it might be most advisable to take in order to fulfil Robert Anstey's promise to this defendant of making some provision for Lucretia Anstey and her children by her former marriage, this defendant requested an interview with the plaintiff Luders; which at length took place; when the defendant acquainted Luders with the purport of the conversation, which passed between him and his brother at Bath respecting a settlement; and that his brother had left it to him to arrange the terms: but no measures were then taken.

Upon the defendant's return to Bath with his sister several meetings upon the subject took place between the plaintiff Luders and him. The defendant at first proposed to settle for the benefit of Lucretia Anstey and her children by her former

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husband one third of the fortune, to which she was then entitled out of the estate of her former husband; and the plaintiff eagerly acceded thereto, and expressed himself highly satisfied therewith: but the defendant in order that he might manifest his brother's sincere wish and intention, as he expressed to him, to do everything, that was handsome towards the children of the former marriage, as far as might be consistent with making a due provision for the children of the second marriage, took upon himself afterwards to propose to settle one half, instead of a third only, of her said fortune, and to settle the other moiety thereof for the benefit of Robert Anstey and Lucretia, and the children of their marriage, if they should have any; and that the plaintiff not only expressed his consent and approbation of that proposal, but declared, that such settlement of a moiety upon the children of the first marriage was highly *satisfactory [*511] to him, and perfectly honourable and liberal on the part of the defendant. Lucretia Anstey was not present at these meetings: but the defendant communicated to her from time to time upon the subject of the intended settlement; and she expressed herself highly satisfied and pleased with the arrangement.

The answer stated, that, there not being time to prepare a regular deed of settlement, it was agreed between the plaintiff and the defendant Arthur Anstey, that a bond should be executed by Robert Anstey, conditioned for making the settlement agreed on; and the defendant Arthur Anstey at the request of the plaintiff drew a draft of the condition of such bond; and several conferences took place between them upon the subject in the course of drawing the draft; and they went through it together.

The answer farther stated, that the recital contained in the condition of the bond of Robert Anstey's being desirous of fulfilling the promise he made to the said Lucretia before his marriage with her of making some provision for her was interlined in the original draft of the said bond in this defendant's hand-writing, and is a variation in the form of the draft, as originally worded by the defendant; and for the reason hereafter given the defendant is convinced and verily believes, such interlineation or variation was not made or consented to on the

part of the defendant from the idea, that Robert Anstey had actually made any specific promise to Lucretia Anstey before his marriage, or any proposal, offer or promise whatsoever, other than the promise made by him to this defendant on the morning of the marriage; and in particular that the said recital did not, nor could, bear any relation to the proposal, overture, or suggestion, in the letter of the 17th of April, 1791: nor could such letter be in the contemplation of either the plaintiff or the defendant, when the said bond was prepared, because neither he, nor, as he believes, the plaintiff, then knew of any such letter having been written by Robert Anstey, nor of his having ever made any such proposal.

The defendant Robert Anstey did not read the bond; nor was it read to him: but he was informed by his brother generally of the contents; upon which, as soon as he understood, that the plaintiff and Mrs. Anstey were satisfied, he executed it immediately: nor did he know more of the contents than by *that general information, till after he and Mrs. Anstey had arrived in India; when he received a copy of it. [*512]

Solicitor-General and *Mr. Cox*, for the plaintiffs, made two points: First, that the letter of the 17th of April, 1791, must be the basis of the settlement:

Secondly, that the subject of the settlement was the fortune of Mrs. Anstey, as it existed at the death of her first husband; as to which they relied upon the provision in the bond for payment of all costs and expenses, which had been or might be incurred respecting the affairs of William Light.

LORD CHANCELLOR:

I do not see, how it is possible to avoid making the letter the basis of the settlement: Mr. Anstey having instantly followed the letter: and the marriage having taken place immediately.

This is a very important case; and the old cases in Equity Cases Abridged, and particularly *Cooks* v. *Mascall*† are not near so strong.

† 2 Vern. 210; 1 Eq. Ca. Abr. 22.

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The phrase of this letter is very strong. It purports to be an answer to objections made by her to the marriage; which he endeavours to obviate: first, as to his age: secondly, it is evident, she had objected, that after doing what she was in duty bound to do towards her existing children, they would not have enough to live upon. To these objections he makes this answer: and the phrase is "I have proposed." He refers to it as a foregone proposal in some conversation between them. Therefore upon his part this letter contains a specific and complete arrangement of their money affairs: and upon this letter the marriage took effect. The only conclusion I can now draw is, that this satisfied all her objections; and she married.

Mr. Mansfield, *Mr. Richards*, and *Mr. Alexander*, for the defendants:

The proposal by the letter never was agreed to, or in any manner noticed, by Mrs. Anstey; and the answer of Arthur Anstey shews, the bond could have no relation to that letter. The letter was not known either to him or the plaintiff. The
[*513] *recital of the previous promise was merely inserted by interlineation on account of creditors; the settlement being after marriage. Arthur Anstey, who prepared it, frequently conferred with Mrs. Anstey upon the subject. Both she and her brother approved of it. The proposal in the letter, to settle her whole fortune, reserving for themselves only the interest of one-third for their lives, is very absurd; and there is a previous condition, upon which the whole depends. The letter was not put into the hands of a trustee or a friend, but was preserved by mere accident, and was found among Mrs. Anstey's letters after her death. It was not kept with a view to any transaction that was to arise upon it. It is evident from her assenting to the terms of the bond, that she did not consider her property to be bound by the letter. Unless it can be raised to an agreement binding her equally, it cannot bind the defendant. It is to be observed, that the letter was written on Sunday, and therefore could not have been put into the post until the next day; and on Wednesday the defendant went to Bath.

If the settlement is to be made according to the letter, the

defendant is entitled to one-third in right of the deceased child, and to the interest of another third for his life, and a share of that third also in right of the deceased child.

Upon the other question, the recital of the bond shews, that nothing more than a moiety of the then existing fortune of Mrs. Light was to be settled. Other words would have been proper, if the intention was to settle a moiety of the whole fortune, that ever existed, as has been contended upon the provision for payment of all costs and expenses, that had been or might be incurred in any suit respecting the affairs of William Light: but those are only general words. All the fortune, that ever existed, cannot be intended.

LORD CHANCELLOR:

The account to be taken in this cause will not be of the estate of William Light, but of how much the defendant Robert Anstey received in right of his wife. In order to have that ascertained an account of Light's assets must be taken in the other cause.

I think, the bond having established, that it was intended [514] to be for the purpose of fulfilling a promise made before marriage, and a written promise before marriage being preserved, upon which without more the marriage took place, I must bind him by that.† I must take the fact as Arthur Anstey states it; that his reason for inserting the recital was his recollection of the promise his brother made to him. It is requiring a good deal of me, when he recites a promise, that I should give him credit for not knowing the contents of the letter. I do not mean to impeach the credit due to both the answers: but upon the face of the writing here is a bond, with the defendant's name to it, reciting a promise before marriage; and there is a promise made before marriage.

But I will put that out of the case; for if the bond had never existed, and the marriage had taken place upon the letter without farther communication in favour of Light's children or the

† The counsel for the defendant here observed, that Arthur Anstey, whom the LORD CHANCELLOR had said he should consider as a witness, proved, that the bond was not made in consequence of any promise except the verbal promise, made to him just before the marriage.

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children of this marriage I should have held them bound; and that the defendant Robert Anstey was clearly bound by this engagement. She marries upon this engagement. Suppose there were children of this marriage, it is impossible to say, both the father and mother would not be bound; though it was only her fortune. There is no *locus pœnitentiæ* in this case; and I should require a positive, distinct, dissent; and that could not be evidenced by anything but an actual settlement before marriage varying from that. Certainly it was a reasonable, proper, and perfectly right, settlement. It is clear, the embarrassment as to the difficulty she found of leaving the children she then had, unprovided, was one obstacle to the marriage. They were referred to by Mr. Anstey in the letter in terms of affection. Her anxiety was removed by that proposal; which according to the letter had been the object of previous communication; and of which he speaks in a manner that would bind him; and in consequence the marriage took place. So that I do not lay much stress in support of the decree upon the bond having this recital in it. I really believe what is said in the answer of

[*515] Arthur Anstey as to the recital in the bond: though it *is very difficult for the Court to conclude against the written instrument.

I rather think, the defendant is entitled to one third of the fortune in right of his child, who is dead. The meaning of the letter is very clear. Upon the supposition, that there would be more than four children, he did not intend, that his children should be worse off than those by the first marriage. That would make it necessary to throw the two-thirds together into one fund, and divide it equally.

Therefore decree a settlement to be executed, to carry into effect the terms of the letter, dated the 17th of April, 1791.

* * *

1800. *Feb.* 8.

[5 Ves. 217]

[After a rehearing as to the construction of the letter of the 17th of April, 1791,]

The decree, as finally drawn up, declared, that a settlement ought to be made by the defendant Robert Anstey to carry into effect the terms of the letter, dated the 17th of April, 1791. An

account was directed of the fortune which Lucretia Anstey was possessed of or entitled to at the time of her marriage with the defendant, come to his hands, and to the hands of the plaintiff William Stratton Dundas Light, administrator *de bonis non* of William Light (who had attained the age of twenty-one); and an account of such parts of the estate and effects of William Light as came to the hands of the plaintiff Luders, from the foot of the account settled with the administratrix, and the release, dated the 22nd of October, 1793. Then, after directing the costs to be paid out of the fortune of Lucretia Anstey, it was declared, that one-third of the remainder of the fortune, to which he was entitled, as aforesaid, belongs to the defendant Robert Anstey in right of his deceased child; and that one-fifth of another third also belongs to him in the like right; and that the remaining four-fifths of that third will belong to the plaintiffs William Stratton Dundas Light, Alexander Whalley Light, Lucretia Light, and Henry Light, at the death of Robert Anstey; and the Master is to see such two-fifths * settled on Robert Anstey for his life, with remainder to the said plaintiffs; and that the remaining third belongs to the said plaintiffs (the Lights) in equal shares.

The necessary directions were given as to the shares belonging to the plaintiffs; of whom three were still infants: and upon the suggestion of the *Attorney-General*, that the defendant had maintained them, an inquiry was added, what he had expended, and what was proper to be allowed for their maintenance.

* *Sic* in Vesey's report, but apparently an error for *four*-fifths.—F. P.

1799.
April 19, 22.

LOUGHBOROUGH, L.C.

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HOWSE *v.* CHAPMAN.†

(4 Vesey, 542—551.)

Bequest for the improvement of the city of Bath, construed to mean improvements carried on under an Act of Parliament, not by private persons.

Specific disposition by will in trust to sell, and in the first place pay debts, legacies, and charges of probate and execution of the trust, and in the next place, that the residue of the money be appropriated to the improvement of the city of Bath, is void by statute 9 Geo. II. c. 36, as to a navigation share; which, being real estate, goes to the heir; and as to money on real securities, as mortgages, turnpike bonds, and commissioners' bonds for the improvement of the city of Bath; which go to the next of kin: the general residue undisposed of was first applied to the debts and other charges; and the deficiency was borne by the trust property, that passed to the city of Bath, and that, of which the disposition failed by the statute, *pro ratâ*.

LEONARD COWARD by his will, dated the 23rd of May, 1794, and duly executed to pass real estate, after giving particular directions as to his funeral, and some legacies of 20*l.* each for mourning, gave to Elizabeth, the wife of Thomas Baldwin, her executors, administrators and assigns, his freehold house fronting the North Parade at Bath, as well as five commissioners' bonds for the improvement of the city of Bath, of 100*l.* each, to be paid within the year, having them in his possession; that her husband have no control or power over the said house and bonds; but that it shall be in her sole disposal, to do with it as she shall think proper, for ever. He gave to Mary Chapman a house and five other commissioners' bonds for the improvement of the city of Bath, of 100*l.* each, to be paid within the year, having them in his possession, to be her sole property for ever; and he gave to *Anne Chapman a house and five other commissioners' bonds for the improvement of the city of Bath in the same manner.

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The testator then, after giving some specific and pecuniary legacies and annuities, (some of which were given to charities,) and among them four corporation bonds for 500*l.* each, ordered all his plate to be sold upon the best terms and without reserve by auction or otherwise; as also one share of the Bath Navigation, if not disposed of before his death, and all the furniture of

† *Kilford* v. *Blaney* (1885) 31 Ch. D. 56, 55 L. J. Ch. 185.

his house, utensils and implements of household, goods, linen, china, (except the ornamental jar, books, and book-case, herein before given to George Redmond,) and pictures, (except some prints and pictures, which belonged to the late Mr. Redmond, among whose family the testator directed them to be divided). Then after giving to the two servants, who are and shall be living with him at his decease complete mourning and all his wearing apparel under every description, to be equally divided between them, and to each of them a legacy of 200*l.* to be paid in twelve months after his decease, the testator proceeds thus:

"And my farther will is, that my executors in trust hereinafter named do collect together all the money arising from the sale of the furniture of my house, plate, and one share of the Bath Navigation, if not disposed of before my death, as well as all securities for money, mortgages, corporation bonds, in the funds, in the Milsom-street bank, turnpike bonds, commissioners' bonds for the improvement of the city, East India bonds, and by and out of the monies so arising in the first place pay and discharge my just debts, legacies, funeral expenses, and charges attending the probate and execution of the trusts of this my will; and that Mr. Smith, notary public, be employed in the proving of my will, and in every other respect where his advice shall be necessary; and in the next place my will is, that the residue of the money be appropriated to the improvement of the city of Bath, and be placed by my executors in the bank of Messrs. Hobhouse, Clutterbuck, Phillott, and Lander, in this city, at the rate of 3*l.* per centum per annum; and that it shall be drawn out of the said bank as the improvements shall require."

The testator then directed that his namesake Thomas Coward should bury him, and find mourning; and declaring, that now *having made his will, and disposed of his effects agreeable to his own inclination, though perhaps not to the parties concerned, he appointed executors. [*544]

In June, 1795, the testator entered into a contract for the sale of the house fronting the North Parade to Charles Gunning for the sum of 1,050*l.* The testator died upon the 25th of November, 1795:

Upon the bill of the executors praying, that the will may be

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established, and the rights of the parties to the real and personal estate of the testator be ascertained, and that the contract for the sale of the house to the defendant Gunning may be performed, and that directions may be given for the application of the purchase-money, two points were made.

The heir at law and next of kin insisted, first, that the disposition of the residue for the improvement of the city of Bath was void for uncertainty, upon the ground that great improvements were carrying on in that city by private individuals as well as by the commissioners under the statute 29 Geo. III. for the improvement of the city:

Secondly, that if that disposition was not void on that ground, it was void under the statute 9 Geo. II. c. 36, as to all such parts of the residue, as are of the nature or consist of real property.

By the decree made upon the 20th of November, 1797, the will was established, and the trusts were directed to be carried into execution except as to the money secured upon real estate. It was directed, that the contract for the sale of the house should be carried into execution; and that the money to arise by the sale should be considered as personal estate undisposed of by the will, and be paid into the bank; and it was declared, that the Bath Navigation share mentioned in the will belonged to the defendant John Chapman, the heir at law of the testator.

An account of the personal estate was directed; and the Master was directed to state the particulars, of which the per-
[*545] sonal *estate consisted at the death of the testator, and to distinguish particularly, how the same was secured and placed out at his decease, and how it had been applied and disposed of. Accounts of the debts, funeral expenses, legacies, and annuities, were directed; and it was ordered, that the personal estate should be applied in a course of administration; and that an appropriation should be made to answer the annuities. The costs of all parties were ordered to be taxed; and the consideration of farther directions was reserved.

By the Master's report it appeared, that the general residue of the personal estate, not specifically disposed of, consisted of some cash in the house at the testator's death, the money produced by

the sale of the house to Gunning, a debt due to the testator, and some articles of inconsiderable value not enumerated in the will.

That part of the personal estate, which was held not to pass by the bequest for the improvement of the city of Bath, consisted of mortgages to the amount of 4,950*l.*, five bonds of the commissioners for the improvement of the city of Bath, four bonds of the corporation of Bath, and four bonds of the commissioners of a turnpike.

The cause coming on for farther directions, a point was made on behalf of the next of kin, that the debts, legacies, and funeral expenses, and the costs of all the parties, except the defendant Gunning, (who had purchased the house in pursuance of the contract, and whose costs were paid out of the purchase-money,) were to be paid in equal shares and proportions out of the personal estate bequeathed for the improvement of the city of Bath and the personal estate undisposed of.

Solicitor-General and *Mr. Grant*, for the next of kin, one of whom, the defendant John Chapman, was also heir at law of the testator:

In *The Attorney-General* v. *The Earl of Winchelsea* † the general rule was established upon consideration of all the cases, that, where *a residue is left for charitable purposes, including [*346] mortgages and other interests, that cannot go to the charity, the debts and legacies shall be paid out of the two parts of the estate *pro ratâ*. A distinction is attempted in this case, because the testator has not given all his personal estate. Several articles are enumerated; and as to the funds arising from real securities the decree has declared the disposition void: but there are other articles not enumerated; which are claimed by the next of kin as undisposed of. The will has directed the debts, legacies, funeral expenses, and the charges of the probate and the execution of the trusts, to be paid specifically out of this particular fund intended for the improvement of the city. The residue undisposed of was therefore intended to go to the next of kin free from those charges; and as to so much as cannot pass to the

† 3 Bro. C. C. 373.

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charity there should be the same appropriation as in *The Attorney-General* v. *The Earl of Winchelsea*; each fund bearing its proportion *pro ratâ*. * * *

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Attorney-General, *Mr. Mansfield*, and *Mr. Graham*, for the defendant, the Clerk of the Commissioners for the improvement of the city of Bath:

The Attorney-General v. *The Earl of Winchelsea* has no relation to this question between persons entitled to this fund for the benefit of the city of Bath as specific legatees, and those claiming the general residue, first, because something is given for the benefit of the city, which cannot pass; secondly, because the testator has omitted some particulars in the enumeration of the articles to be applied for the benefit of the city. In that case there was a general residue given to a charity, which comprehended certain things, which could not be given for that purpose; and in order to pay the debts and legacies that apportionment was taken as the rule.

The question in this case is, whether, where there is a specific bequest to a charity, and a residue undisposed of, which the next of kin take by operation of law, not under the will, they have a right to say, they shall take that part of the personal estate, which is undisposed of, free from the debts, legacies, and other charges. The legacies are in exactly the same case as the debts; for they are general legacies; though there is in this disposition for the benefit of the city of Bath a direction for paying the legacies as well as the debts. If the whole residue was given for the city, the rule adopted in *The Attorney-General* v. *The Earl of Winchelsea* must be applied: but this is not, as in that case, a disposition of a general residue, some parts of which happen not to be effectually given: but the general residue consists of two species: so much of the personal estate, of which no disposition is attempted, *and so much as was comprehended in the gift of the city of Bath, but was not effectually carried by that gift. The debts and legacies are to be paid out of the residue; and there can be no foundation for distinguishing a gift falling into the residue by the effect of the statute,† so as to throw any part of the

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† 9 Geo. II. c. 36.

debts and legacies upon the specific legacies well given to the city. This is not like marshalling. There cannot be a marshalling of assets for a charity, I admit. If this fund is specifically given to the city, the former decree has shut out the question.

The will gives nothing to the next of kin. It is purely the disposition of the law. Then is there any case, where the next of kin taking the residue by intestacy have taken it free from the debts and legacies, given generally, against a specific gift of the personal estate, merely because that is given after payment of the debts and legacies? * * If an executor takes the personal estate by the office of executor, without a trust, it shall not be free from the debts, merely because another fund is subjected to the debts. As to the real estate the rule is very clearly laid down by the MASTER OF THE ROLLS in *Manning* v. *Spooner*,* that the order of application to the debts is, first, the general personal estate, unless exempted expressly, or by plain implication; secondly, any estate particularly devised for the purpose, and only for the purpose, of paying debts: thirdly, estates descended: fourthly, estates specifically devised: but his opinion was, that if a particular estate is devised for paying debts, but the intention is, that the surplus shall go to other persons than the heir, then the descended estate shall be first applied. The next of kin in this case claim by no intention. Unless they shew an intention to exempt the residue of the personal estate from payment of the debts, they must take it subject to them. There can be no doubt from the very particular enumeration, the testator thought he had disposed of the whole residue: but he happened not to mention all, and not to throw in the general words "all my personal estate." It must therefore be considered, as it was upon the former hearing, a specific bequest. Considering it so, the legacies would not have been charged, if he had not used words charging them. This is the first instance of such a claim.

Solicitor-General, in reply: [549]

The cases cited, where a devise of real estate for the payment

* 3 R. R. 67.

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of debts was held not to exonerate the personal estate, do not apply. But the question is in principle that decided in *Powis* v. *Corbet*,* and *Donne* v. *Lewis*,† both cases upon real estates between the heir at law and particular devisees; and the principle is, that, where a testator expressly appropriates a particular part of his real estate, that appropriation shall be taken to be for the benefit of the heir at law, as much as for the benefit of the devisees of the other part of the real estate. *Powis* v. *Corbet* was determined by Lord HARDWICKE in view of *Galton* v. *Hancock*;‡ and the principle, which is confirmed by Lord THURLOW in *Donne* v. *Lewis*, applies thus: the testator has declared, that a particular part of his personal estate shall be a fund for payment of his debts, &c.; and that what he has given to the legatee is only so much of that particular fund as shall remain after answering those charges. Therefore it is a provision for the benefit of all the specific legatees, and of those entitled to that part of his personal estate, that is not comprised in the will. He has given nothing but what remains of that fund after answering those charges. This differs from *Gray* v. *Minnethorpe*, and the other cases of that class; for this is a selection of a particular part of the general personal estate as a fund for these charges, and nothing is given but the surplus. What is contended for the city of Bath, that the general residue of the personal estate and the mortgages and other interests, that cannot pass under the bequest to the city, are to be applied to the debts, &c. in the first place, is by circuity marshalling assets in favour of a charity; a contrivance to throw the charges upon that part of the personal estate, which is ineffectually given, merely because the testator has in the enumeration made by his will omitted some articles of inconsiderable value. *The Attorney-General* v. *The Earl of Winchelsea* is in exact conformity to *Akeroyd* v. *Smithson*§ and the other cases of that class.

LORD CHANCELLOR:

This bequest to the city of Bath of particulars enumerated is specific. As to the general residue, must it not be all applied to

* 3 Atk. 556.
† 2 Br. C. C. 257.
‡ 2 Atk. 424.
§ 3 P. Wms. 22, Mr. Cox's note.

pay the costs? Are not the costs of executing the *will always paid out of a residue undisposed of? Is there a single instance, where the costs of the cause have not been thrown upon the undisposed residue? I was struck at first with the singularity of the next of kin raising a right to themselves out of the construction of a part of the will that gives from them. How can the next of kin argue upon the intention of the testator in their favour? [*550]

There is no strict analogy between a devise of land, creating a fund for the debts, and a residue of personal estate. First, the land is not subject to simple-contract debts. Secondly, it is a devise in favour of simple-contract creditors. The specialty creditor upon a devise for payment of debts must come in under the will.

This testator certainly intended to give everything. The value of the articles omitted in the enumeration is very trifling: but he happened to sell in his life-time a real estate, which brings about 1,000*l.* to the personal estate. He had contracted to sell it; and the Court has directed that contract to be carried into execution. They must give to the next of kin these things, the disposition of which fails, because the law will not suffer them to pass: but the 1,000*l.*, which makes the general residue, must be applied to payment of debts and other charges. It is exactly within the case of *The Attorney-General* v. *Winchelsea* with regard to the mortgages and other things, that are taken out of the bequest, because the law takes them out of it.

The decree directed the Master to carry on the accounts and to distinguish the general residue of the personal estate undisposed of from the specific particulars thereof bequeathed for the improvement of the city of Bath; to tax all parties their subsequent costs, to be paid out of the sum of 1,048*l.* 19*s.* cash in the bank, part of such general residue; that the sum of 395*l.* costs before taxed, and paid by the plaintiffs out of the general personal estate come to their hands, be repaid them; that the remainder of the said sum of 1,048*l.* 19*s.* together with the remainder of the general residue of the testator's personal estate be applied in payment of his debts and *funeral expenses in a course of ad- [*551]

HOWSE v. CHAPMAN.

ministration, and then in payment of his legacies, as far as the same will extend.

It was declared, that the bequest for the improvement of the city of Bath was a charitable bequest; and that the mortgages, the five bonds of the commissioners for the improvement of the city of Bath, and the four bonds of the commissioners of the turnpike, did not pass thereby, but are undisposed of by the will, and belong to the next of kin of the testator. It was directed, that the Master should distinguish such of the particulars of the personal estate specifically bequeathed for the improvement of the city of Bath, as are well given and passed by such bequest from such of the particulars as did not pass thereby, but belong to the next of kin; and it was farther ordered, that the same be applied *pro ratâ* in payment of so much of the testator's debts, legacies, and funeral expenses, and of so much of the costs of this suit, as the general residue of the testator's personal estate undisposed of by his will will not extend to pay; and it was directed, that such particulars of the personal estate specifically bequeathed for the improvement of the city of Bath, as did not pass by the bequest for that purpose, be divided, after the payments thereout before directed, among the next of kin of the testator according to the Statute of Distributions: and that such particulars specifically bequeathed for the improvement of the city of Bath, as are well given and passed by the bequest for that purpose, be, after the payments thereout before directed, paid, transferred, and delivered, to the defendant John Sealy Lawton, the clerk to the commissioners for the improvement of the city of Bath, to be applied, &c.

CROSBIE *v.* MAC DOUAL.†

(4 Vesey, 610—617.)

1799.
May 4.

ARDEN, M.R. for the LORD CHANCELLOR.

[610]

All codicils are part of the will. Therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil.

Two inconsistent wills: a codicil referring to the first by date as the last will cancels the intermediate will; and evidence of mistake cannot be admitted.

GENERAL CROSBIE by his will, dated the 27th of May, 1790, and attested by two witnesses, directed, that all his debts, legacies, and annuities, therein mentioned should be fully paid and satisfied, and also such other annuities and legacies as he should at any time hereafter leave by any codicil or codicils or note or memorandum thereof in his own handwriting should be taken as part thereof; and, subject thereto, and charged and chargeable therewith, the testator gave and bequeathed all his monies in the public funds, mortgages, bonds, bills, notes, debts, and all other his personal estate of what nature or kind soever and wheresoever, unto John Antrobus, Andrew Elliot, John Otto Boyer, and John Jackson, their executors and administrators, and to the survivor, his executors, &c.; upon trust as soon as conveniently might be after *his decease to lay out the same in the purchase of lands of fee-simple; and that the same, when purchased, should be conveyed to the said trustees and their heirs, upon trust in the first place to secure the several annuities after given. [*611]

The testator then gave to his sisters Elizabeth Ross and Frances Crosbie, each, for and during the term of their natural lives, an annuity or clear yearly rent-charge of 300*l.* by half yearly payments, to commence from and immediately after his decease: and he gave unto his sister-in-law Mrs. Sarah Crosbie, the wife of his brother Charles Crosbie, for and during the term of her natural life one other annuity or clear yearly rent-charge of 200*l.*, to commence from and immediately after his decease; and he declared, that the said three annuities were given upon

† *Green* v. *Tribe* (1878) 9 Ch. D. 231, 47 L. J. Ch. 783; *Follett* v. *Petman* (1883) 23 Ch. D. 337, 342, 52 L. J. Ch. 521.

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the express condition and to be considered in full satisfaction of all annuities or yearly sums of money, which he then paid, or might at any time pay, them or either of them, whether secured by bond or otherwise; and in such case he directed such securities to be delivered up. Then after some other annuities he gave unto the said Sarah Crosbie in case she should survive Charles Crosbie, her husband, one annuity or clear yearly rent-charge of 300*l.*, to commence and become payable from and immediately after his decease, over and above the annuity of 200*l.* before given to her; and after payment of the said annuities, and all such annuities and legacies as he should give by that his will or any codicil or codicils in writing, and subject thereto, then upon trust to permit his brother Charles Crosbie to receive the rents and profits for life; remainder to trustees to preserve contingent remainders; remainder to his son John Crosbie for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons, in tail male; remainder to the testator's brother John Crosbie, and his first and other sons, in the same manner; remainder to the first and other daughters of Charles Crosbie, his son John Crosbie and the testator's brother John Crosbie, successively, in tail general; and in default of such issue to such uses as the testator should by any deed or deeds in writing, or by any codicil or codicils in writing to that his will, duly executed in the presence of two or more credible witnesses, direct, limit, or appoint. He directed the interest and dividends of his personal estate, until laid out, to be applied to the legacies and annuities, and the surplus to the persons

[*612] *entitled under the will, as if it had been invested in real estate; and he appointed his trustees executors.

By two codicils, dated the 29th of May, 1790, the testator gave some annuities and legacies; and gave some directions for the maintenance and education of his natural son Charles Carr Carmichael.

By the fourth codicil, dated the 2nd of June, 1795, duly executed to pass real estate, the testator reciting, that he had by his will given and bequeathed unto his sister-in-law Sarah Crosbie, the wife of Charles Crosbie, for the term of her natural life one annuity or clear yearly rent-charge of 200*l.*, thereby

revoked and made void the said bequest and all and every other bequest in his said will to said Sarah Crosbie; and reciting, that since the making his said will he had purchased several freehold estates at Sunning Hill, Berks, he devised the said estates to the trustees named in his will upon the same trusts as by his will were directed concerning his personal estate; and by virtue of the power, he had reserved in and by his last will and testament, and of all other powers, he did by that his codicil appoint his said newly-purchased real estate, and all his personal estate, and the same, when invested in the purchase of messuages, lands, tenements and hereditaments, upon the trusts of his said will, subject to the uses and limitations thereof, to the use of the said Charles Carr Carmichael for and during the term of his natural life; and after the determination of that estate, to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to his first and other daughters; remainder to the testator's own right heirs for ever; and he thereby ratified and confirmed his said will and all matters and things therein contained and not thereby altered in all other respects.

By the fifth codicil, dated the 4th of June, 1795, the testator reciting, that he had made his will, dated the 27th of May, 1790, and had thereby ordained, constituted, and appointed, John Jackson one of his executors, and trustees under his said will, did thereby make, ordain, constitute, and appoint Robert Mac Doual to be executor and trustee of his said will in the place and stead of the said John Jackson; declaring, that Mac Doual should have *full power and authority to act in the [*613] execution of his will as fully as Jackson could have done if the said codicil had not been made. This codicil concluded with these words:

"And I do hereby confirm my said will in all other respects."

The last codicil was unattested.

After the death of the testator the bill was filed by his brother Charles Crosbie and his son John Crosbie; praying, that the will might be established, and the accounts taken; and that the plaintiffs may be declared entitled, according to the will; and that the annuities of 200*l.* and 300*l.* given by the will

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to the defendant Sarah Crosbie may be declared revoked by the fourth codicil, and not to have been revived or set up by the fifth.

The only question was upon the latter part of the prayer of the bill, as to the annuities.

Mr. Mansfield and *Mr. Lloyd*, for the plaintiffs, and *Mr. Bell*, for the defendants in the same interest:

The fifth codicil is so confined to a particular object, that it could not republish the will generally: Com. Dig. title Devise, E. 5. This codicil was made merely to substitute the defendant as a trustee in the place of Jackson. The testator had no intention to revive these annuities. The confirmation of the will must apply also to the prior codicils: otherwise this absurdity would follow; that Jackson being removed as a trustee in the will would remain a trustee in those codicils.

[*The Solicitor-General*, for the defendants Charles and Sarah Crosbie, cited *Lord Walpole* v. *Lord Orford*, *ante*, p. 38.]

[614] *Mr. Mansfield*, in reply. * * *

[615] MASTER OF THE ROLLS:

When this case was stated, I had no doubt upon it; and the *Solicitor-General* has not been able to succeed in applying that case upon Lord Orford's will, upon the authority of which alone he rests, to this. I shall give my opinion at present, having very little doubt; and if upon reading that case I see any reason to alter that opinion, I will mention it on Monday.

The testator by his will gives two annuities to Sarah Crosbie. By the fourth codicil he revokes those annuities. Two days after the execution of that codicil, it is said (but that I lay totally out of the case; for I cannot say, two days will furnish a presumption, that four days or ten days would not furnish) but two days after the execution of the fourth codicil the testator makes a fifth, expressly calling it a codicil to his will; by which he substitutes one executor for another: and then in the common way, quite unnecessarily, he declares, that is the only point, in which he makes any alteration in the will; for that is

the real meaning of those words; that having altered his will in one respect he means to alter it in no other. The question then is, whether the fourth codicil, so far as it is inconsistent with the will, is revoked in consequence of this reference by the fifth to the will; which indeed is the case of every codicil; which must refer to some will, the last in date, if no express date is mentioned; if there is, that of the particular date expressed. The case upon Lord Orford's will only determines, *that a codicil [*616] referring to a former will as the last will cancels intermediate wills. But the point contended in this case is, that it sets up all the will against a codicil revoking it in part. That case will not by any means bear out that argument. It is perfectly true, that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil, that has been added to it. There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both in the Ecclesiastical Court. The last is the will. From the nature of the instrument it revokes the other. If the last purports to be the whole will, a complete, substantive, will, they do not, I conceive, prove both. Unless there is something to shew, it was meant to be coupled with another instrument, it is not taken to be a codicil. But if it does purport to be coupled with another instrument, it is as much a part of that instrument, as if it was written upon the same paper. Many absurdities would follow from the contrary construction. Suppose the testator had by his will given a legacy of 200*l.*, and by a codicil had given the legatee 100*l.* instead of the 200*l.*, and then should make another codicil, of this sort, merely changing an executor, and ratifying and confirming his will in all other respects. Is the legatee to have both the 200*l.* and the 100*l.*? That must be contended.

The true rule upon the subject appears to me to be as I have stated. The *Solicitor-General* confesses, that if it was not for the case of *Lord Walpole* v. *Lord Orford*, he should scarcely have been able to argue it: but he thinks that case affords him a sufficient ground. It differs in this essential point. There was no question in that case upon a will and a codicil. The question was upon two inconsistent wills; one made in 1752; the other

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in 1756. The second had destroyed the first, unless the testator thought fit to revive it. By a codicil in 1776 he expressly declares it to be a codicil to his last will and testament, dated the 25th of November, 1752. That was held to cancel the intermediate will. All that the courts of law, first the Court of Common Pleas, and afterwards the Court of King's Bench, determined, was, that evidence could not be admitted to prove the mistake, and that the testator did not mean to refer to the will, to which the codicil did expressly refer. It was said, that it

[*617] really arose from the mistake of the person employed *to draw the codicil; who took the wrong will. Both the courts of law were of opinion, they could not receive evidence of that: as the testator had solemnly declared, the will of 1752 was his last existing will. It would not at all affect the case of any codicil made as an appendix to either of his two wills. If the will had dropped, perhaps a codicil, professedly a codicil to that will, would have dropped with it. That might have been a nice question; whether a codicil, which in words referred only to the will of 1756, would not have fallen with that will. I will look into that case before Monday; and if I see any reason to alter my opinion, I will mention it.

Declare, that the annuities of 200*l.* and 300*l.* given by the will of Sarah Crosbie were and remain revoked by the fourth codicil.

The case was not mentioned again.

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(4 Vesey, 623—627.)

1799.
May 8, 9.

Rolls Court.
ARDEN, M.R.

[623]

Testator made a provision for his wife; and gave a sum of money in trust for the separate use of a daughter, and after her death to divide the principal equally between her children and their issue at twenty-one; if none such, to his son, whom he made residuary legatee. Then after similar, but unequal, provisions for his other children he declared, that the provision in the will for his said wife and their said children was in satisfaction of all right, claim, &c., which she, or they, or any or either of them, could set up, &c., or which she and they would be entitled to under his marriage articles; and if his said wife and children or either of them should refuse, &c. he revoked the legacy and bequest therein contained to the use and benefit of such one or more of them his said wife and children, who should refuse or decline to execute such release or discharge; and declared the same void as to such one or more of them, who should so refuse, as though he had died intestate. A child, electing to take under the articles, forfeits the life-interest, which falls into the residue: but the children of such child are not bound by the election, and liberty was given to apply on the death of the parent.

By articles, dated the 31st of July, 1760, previous to the marriage of Lancelot Cowper and Ann Bisse, Lancelot Cowper in consideration of the marriage and a portion of 2,000*l.* covenanted with the trustees, that if Ann Bisse should die in his life-time, leaving issue one or more child or children by him, then his heirs, executors, or administrators, should in six calendar months after his death pay to the said trustees, their executors, administrators, or assigns, 2,000*l.* with interest at 4 per cent. per annum from his death, upon trust, if there should be but one child, for such child; *and if there should be more than one child, in trust for all of them, equally to be divided, payable to a son or sons at the age of twenty-one, and to a daughter or daughters at that age or day of marriage, which should first happen; provided it should happen after the death of Lancelot Cowper; but if such son or sons should be twenty-one, or daughter or daughters of that age, or be married, in the life-time of Lancelot Cowper, then the shares of such children to be paid within six calendar months after his death; with a clause, that in case any child should die a minor, or before their portions become payable, the same should go to the survivors; and in case Lancelot Cowper should die in the life-time of Ann Bisse, then the heirs, executors, or

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administrators, of Lancelot Cowper should within six calendar months after his death pay to the said trustees, their executors or administrators, 4,000*l.* with interest, as aforesaid, upon trust to place the same out at interest in the public funds or government or real securities, with the consent of Ann Bisse during her life, and to permit her or her assigns to receive the interest, dividends, and proceeds, thereof to her own use during her life; and immediately after her decease, in case there should be issue one or more child or children of her body by the said Lancelot Cowper begotten, in trust to call in the said 4,000*l.*, and to pay the same to such child or children at such times, and in such shares, proportions, and manner, as before expressed; provided such times of payment should happen after the decease of Ann Bisse; with directions as to the application of the interest during the minority of the children.

The issue of this marriage was three children; Margaret, the wife of John Ward, Ann Wade, and John Cowper. Margaret Ward attained the age of twenty-one before her marriage.

Lancelot Cowper died in 1794; leaving his widow and children surviving. By his will, dated the first of July, 1794, he gave the interest of 1,000*l.* to his wife Ann for her life, and he gave her power to divide the principal money among his children; and he made other provisions for his wife to a considerable amount.

The testator then gave to his executors and trustees the farther sum of 1,400*l.*, upon trust to place the same out at interest, and to pay the interest into the proper hands of his

[*623] daughter Margaret *Ward; her receipt alone to be a discharge; and on her death to divide the principal equally between her children and their issue at twenty-one; if none such, to his son John Cowper; whom he made his general residuary legatee; and he made similar, but unequal, provisions for his children Ann Wade and John Cowper. Then reciting his marriage articles the testator declared, his will and meaning was, that the provision in and by that, his said will, made for his said wife and their said children was intended by him, and was to be considered by them, in lieu and full recompense, satisfaction, and discharge, of all right, claim, and interest, which she or they or any or either of them could, should, or might, set up or demand

upon or against his estate or effects, or against his executor, for or in respect of the said sums of money, which in either of the events aforesaid would become payable, and which she and they would be entitled to, out of his said estate and effects, by virtue of and under the said articles of agreement and every part thereof; and that if his said wife and children, or either of them, should upon request to them for that purpose by his executors or the survivors or survivor of them, his executors, &c. decline or refuse to accept of the provision hereby made for them, and to discharge the said estate and effects, and his said executors, and also the said trustees in the said articles of agreement, from the payment of the monies in and by the said articles of agreement covenanted to be paid, then the testator did revoke and make void the legacy and bequest therein contained to the use and benefit of such one or more of them his said wife and children, who should refuse or decline to execute such release or discharge; and did thereby declare the same to be from thenceforth null and void as to such one or more of them, who should so refuse, as fully and absolutely as though he had died in a state of intestacy.

The bill was filed by John Ward and Margaret, his wife; praying, that the executors of the testator may be decreed to raise and pay to the plaintiff out of the assets the sum of 1,333*l.* 6*s.* 8*d.* her share of the 4,000*l.* mentioned in the articles, in case Ann Cowper, the plaintiff's mother, shall elect to take under the will, with interest from the time of her election: or otherwise, in case she hath elected or shall elect to take under the articles, then that the said sum of 1,333*l.* 6*s.* 8*d.* may be paid into the bank, &c. subject to farther order, and upon the trusts of the articles.

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The cause came on in Hilary Term; when a doubt was suggested by the MASTER OF THE ROLLS, whether, though the plaintiff Mrs. Ward should elect to take under the articles, her children would be bound by her election, or whether they might not hereafter claim the bequests under the will; and in the same manner, whether the children of Ann Wade and John Cowper would be bound by the election of their respective parents.

Upon this the cause was ordered to stand over; and Alfred

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Ward, the son of the plaintiffs, Lancelot Cowper Wade, the son of Ann Wade, and Ann Bisse Cowper, the daughter of John Cowper, all infants, were made parties.

When the cause came on again, the testator's widow having elected to take under his will, the plaintiff Mrs. Ward attended in Court to consent, that her share of the 4,000*l.* under the articles should be paid to her husband.

Mr. Lloyd for the plaintiffs contended, that under this will no right of election remained to the children.

Mr. Graham and *Mr. Hubbersty*, for the infant children:

The plaintiff cannot by her election defeat the interest of her child; which is a clear vested interest. The will gives, beyond the estate for life to the plaintiff, a clear vested interest to her children, and to the issue of those children. All, that was intended for the plaintiff, was the interest for life. It is fair to presume, the object of the testator was to give her a life-interest in a sum nearly equal to that under the articles, and to give the absolute interest to her issue. There is a gift over, in case there should be no children. The clause of revocation can only be construed to extend to such one or more of them, his said wife and children, who should refuse to abide by the will. The election of the plaintiff therefore will only make void her life-interest under the will; which will make part of the residue; and after her decease her children will have a right to claim the capital of 1,400*l.* It cannot be supposed, the testator intended, her election should prejudice them. This is not within the principle of the cases of election.

MASTER OF THE ROLLS:

[*627] The question is, what the testator meant by the words "The legacy and bequest," &c.; whether he did not *mean what was given to his daughter and her children. I have some doubt upon the point; but am rather inclined to think, the mother's election will defeat the interest of the child. Then he has purchased her interest; which must go to his personal

estate, to indemnify so far those entitled to it against any loss they may sustain by the election. Lord Chief Justice DE GREY stated that very clearly;* that the estate, which has lost by that election, shall be indemnified by the interest the party electing would have taken. This plaintiff gives up her interest under the will; and the testator's estate is to have the benefit of it. But I cannot finally determine this point now.

MASTER OF THE ROLLS:

May 9.

Upon reading this will I have no doubt, that the children are not bound by the election of the parent. It would be too much to exclude them. It cannot possibly be contended, that this is a mere substitution for the provision made for the children of the marriage; for the testator has given unequal portions. It is not divided equally. The question then is merely, whether these general words should exclude the children. I am clearly of opinion, they are not bound; and therefore shall give them liberty to apply.

Declare, that the interest of the sum of 1,400*l.* under the will during the life of Margaret Ward is part of the residue of the testator's personal estate; with liberty for any person to apply after her death.

COX *v.* CHAMBERLAIN.

(4 Vesey, 631—638.)

1799.
May 9, 11.

Rolls Court.
ARDEN, M.R.
[631]

A. having both a power and an interest, the estate being conveyed to such uses as he should appoint, and in default of appointment, to him in fee, conveys by lease and release, using also words of appointment: the deed operates as a conveyance of his interest, not as an execution of his power; especially if the effect of the latter construction will defeat the object.

BY indentures of lease and release, dated the 24th and 25th of June, 1777, previous to the marriage of Thomas and Elizabeth Cox, two houses in Wisbeach were conveyed to four persons and their heirs, to hold the same unto them their heirs and assigns, upon the several uses and trusts after declared; that is to say,

* *Lady Cavan* v. *Pulteney*, 3 R. R. 8.

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after the marriage to the use of Thomas Cox and his assigns for the term of his life; remainder to the said trustees to preserve contingent remainders; remainder to the use of the said Elizabeth for life, for her jointure, and in bar of dower; and after the death of the survivor to the use of their children according to their appointment, and for want of appointment, equally, as tenants in common, in tail: if but one, to the use of that one, and the heirs of his or her body; and in default of such issue, to the use of Thomas Cox, his heirs and assigns for ever.

The indenture contained a proviso, that it should be lawful for Thomas Cox and his wife Elizabeth during their joint lives by any writing or writings under their hands and seals, attested by two or more credible witnesses, and by and with the consent and approbation of the said two trustees or the survivor of them, testified as therein mentioned, to revoke the uses, estates, [*632] limitations, and *agreements, therein limited or declared concerning the said premises, and to limit, declare, and appoint any new or other uses or estates concerning the premises, whereof the uses should be revoked, or any part thereof; so that at or before the time of such revocation the said Thomas Cox and his wife should with such consent and approbation, as aforesaid, convey and assure other lands, tenements, and hereditaments, of an estate of inheritance in fee-simple, in possession and not in reversion, being freehold, or copyhold subject to a fine certain and not arbitrary, in some convenient place or places in England, of equal or better value than the messuages, lands or hereditaments, the uses whereof should be so revoked, and in lieu thereof, upon such and the like provisoes, limitations and agreements, as the premises, the uses whereof should be revoked, were thereby limited, or as near thereto as might be.

By indentures of lease and release, dated the 11th and 12th of October, 1784, a capital messuage and other premises in Wisbeach were conveyed to Robert Freeman (one of the trustees in the marriage settlement of Thomas Cox) and his heirs, to hold to him and his heirs to the use of such person or persons, and for such estate or estates, interest or interests, and with,

under, and subject to, such powers, provisoes, and agreements, as Thomas Cox should by deed or writing under his hand and seal limit, declare, or appoint; and, in default thereof, to the use of the said Thomas Cox his heirs and assigns.

In 1792 Thomas Cox entered into a contract to sell the estates comprised in the settlement of 1777.

By indentures of lease and release, dated the 19th and 20th of August, 1792, Thomas Cox in pursuance of all the powers in him vested did with the consent and approbation of the surviving trustees in the marriage settlement grant, bargain, sell, alien, remise, release, and confirm, limit, declare, and appoint, and the said Thomas Cox and his wife did with the like consent and approbatiôn convey and assure, to the said surviving trustees and their heirs and assigns the said capital messuage and part of the other premises comprised in the indenture of October, 1784, to hold to them, their heirs and assigns, to and for the same uses, trusts, intents, and purposes and subject to the same powers, provisoes, limitations, and *agreements, as were [*633] limited, declared, and expressed, in and by the said indenture, dated the 25th of June, 1777.

By indentures of lease and release, dated the 19th and 20th of August, 1793, Thomas Cox did with the like consent, as aforesaid, grant, bargain, sell, alien, remise, release, and confirm, and Thomas Cox and his wife did convey and assure, unto the said surviving trustees and their heirs and assigns a piece of ground and other premises in Wisbeach, to hold to and for the same uses, trusts, intents, and purposes, and subject to the same powers, provisoes, limitations and agreements, as were limited, declared, and expressed, by the indenture of June, 1777.

By indentures of lease and release, dated the 21st and 22nd of August, 1793, Thomas Cox and his wife revoked the uses of the marriage settlement.

Some doubts have been thrown upon the title, with respect to the value of the substituted estates, and also upon the supposition, that the indenture of August, 1792, was intended to operate as an execution of a power, and therefore it was doubtful, whether the legal estate did not vest in the trustees in which case the uses declared thereon would be void at law, and would

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be good only as trusts in equity, the purchaser declined to complete the contract; upon which the bill was filed against him for a specific performance; and the usual decree was made, referring it to the Master to inquire, whether a good title could be made.

The Master in his report set forth all the deeds; and he found, that the substituted estates were in August, 1793, of greater value than the estates comprised in the marriage settlement; and that the plaintiff could make a good title to the estates comprised in the agreement.

Exceptions were taken to this report; which were argued with a view to the costs: but the defendant had been a considerable time in possession under the agreement.

Mr. Graham and *Mr. Thompson*, in support of the exceptions:

By the original settlement the legal estate was clearly vested in the parties beneficially interested under that settlement; and
[*634] the trustees *had no legal estate. The question is, whether the conveyance of the substituted estates does not vary essentially in limiting the uses from the uses limited by the original settlement. * * [The instrument amounts to a complete execution of the power, and vests the legal estate in the trustees and thus the objection arises:] the estates of the persons beneficially interested being merely equitable; in which respect there is a material deviation from the settlement; which vested the legal estate in the persons beneficially interested.

Mr. Grant and *Mr. Romilly*, for the plaintiff:

The only question is, whether this instrument operates as a conveyance by lease and release or as the execution of a power? * * The instrument is certainly more proper for the conveyance of an interest than for the execution of a power. The words of appointment are thrown in generally by the conveyancer; and are quite superfluous. The party had no intention of executing the power. The Court always makes the deed operate according to the intention, if by law it may. The intention is declared to be to vest the estate in the trustees to the uses of the

marriage settlement. There is no room therefore for the presumption, that the intention was merely to execute the power, not to convey an interest. That presumption is in opposition to the deed; which goes on to declare, that the estate vested in them, and was to enure, to the uses of the settlement. It does not begin with words of appointment, but with those *importing conveyance. The order, in which the words appear, concurs with the form of the instrument to shew, that the first words in order are intended to be the operative words. He throws in words of appointment, if necessary; meaning to make use of all the powers, that were in him. The deed does not recite the power particularly; but is in pursuance of all powers. * * *.

[*635]

But if the legal estate was vested in the trustees, yet the proviso in the settlement was substantially complied with; for the estates were in equity in the persons entitled under the settlement; and they could come here for the legal estate, whenever they thought fit.

Mr. Graham, in reply. * * *

[The Master of the Rolls, after stating the question, proceeded as follows:]

May 11.

[637]

I must determine upon the case, as it appears upon consideration of the conveyance; and I am clearly of opinion upon every principle, upon which the Court acts with regard to the construction of conveyances, that it would be monstrous in this case to hold, that, where there is a power and an interest, and the act being equivocal, it is doubtful, whether he acted under the one or the other, the Court should adopt that, which would defeat the instrument. But this case goes farther; for the act is not equivocal. The party has made use of words, that have no reference to the execution of a power. I am of opinion therefore, that this is an exceedingly good title. * * *

1799.
May 28.

LOUGH-BOROUGH, L.C.

[649]

LOWNDES *v.* STONE.*

(4 Vesey, 649—651.)

Testator by a will unattested, after, among others, charitable legacies, to be distributed by his executor or executors, gave the remainder and residue of his estate, if any, and effects of what nature soever, and wheresoever, which he should be seised on possessed of, &c. "next kin or heir at law whom I appoint my executor" after debts, &c. paid. He left one brother, and by deceased brothers a niece and several nephews, one of whom was heir at law. Distribution decreed according to the statute.

THOMAS LOWNDES, a clergyman, by his will, dated the 13th of January, 1795, after giving several specific and pecuniary legacies, and among them legacies of ten guineas each to the poor of Astwood and North Crawley, to be distributed by his executor or executors upon Christmas Day next after his death, and a legacy of 100*l.* to his nephew Richard Lowndes, gave and bequeathed the residue of his property in the following manner:

"The remainder and residue of my estate if any and effects of what nature soever and wheresoever, which I shall at my decease be seised on possessed of or entitled unto or interested in I give next kin or heir at law whom I appoint my executor after all my debts and funeral expenses are paid."

This will was unattested. The testator died leaving Henry Lowndes, his only surviving brother. Their eldest brother died in the testator's life; leaving a son, William Lowndes Stone, and a daughter Caroline Lowndes. Three other brothers also died in the testator's life: two without issue: the third left two sons Richard Lowndes and William Lowndes.

The bill was filed by the testator's surviving brother Henry Lowndes, claiming the whole residue.

The defendant William Lowndes Stone, the heir at law of the testator, also claimed the whole. The other nephews and the niece claimed their shares as next of kin.

[650]

The *Attorney-General* and *Mr. Romilly*, for the plaintiff:

Upon the true construction of this will the plaintiff is entitled exclusively to the whole residue: if not, then, the property being personal, the next of kin are in the contemplation of the

* *Re Thompson's Trusts* (1878) 9 Ch. D. 607, 48 L. J. Ch. 135.

testator the heirs at law *quoad* this property; and he did not mean to give it to the heir at law, who would take the real estate, if there was any. It is given to the next of kin in the singular number. In the former part of the will, giving the charitable legacies, the testator supposes, he may have more representatives than one. According to strict language, if he had been asked who was his next of kin, he would have answered, his brother Henry; for in strictness the children of his deceased brothers are not his next of kin; though in the distribution they represent their parents. He means his brother Henry as his next of kin to take this property. If he had died in the testator's life, in which case the nephews and niece would be the next of kin, then they would have been the residuary legatees. In the one case the testator's brother would be the executor, in the other the nephews and niece would be the executors, to distribute the charitable legacies. Though the will is unattested, the testator conceived himself to be disposing of real as well as personal estate.

The *Solicitor-General*, for the testator's niece and all his nephews except the heir at law:

The intention is, that whoever would by law take the property shall have it. It is clear, the testator had in contemplation something different from what is contended by the plaintiff. There is no real estate; and the will is not attested. There was no intention therefore as to real estate. The construction, that the brother must be considered the next of kin to the exclusion of the nephews and nieces, cannot possibly hold. There is no construction, that can by possibility exclude those entitled under the Statute of Distributions, for if the words "next kin" and "heir at law" are synonymous, those entitled under the statute must take: if they are not synonymous, the disposition is void for uncertainty.

Mr. Mansfield and *Mr. Wooddeson*, for the heir at law:

The heir at law is the only person, that can answer the description. That description is good as *designatio personæ* with respect to *personal as well as real estate. An executor [*651]

LOWNDES v. STONE.

is appointed in the singular number. It is extraordinary, that the testator should add "heir at law," meaning next of kin. He meant to correct the former description by explaining it to mean heir at law; that is, such next of kin, who shall be at the same time heir at law. This construction gives effect to every word of the clause.

LORD CHANCELLOR:

You have a fair retort upon each other. On one side it is contended, that "next of kin" means "heir at law:" on the other, that "heir at law" means "next of kin." It must be distributed according to the statute.

1799.
June 16.

Rolls Court.
ARDEN, M.R.

[681]

CROMPE *v.* BARROW.

(4 Vesey, 681—686.)

An appointment exceeding the power by a limitation to objects not within the power is void as to the excess; as where the power is to appoint to children, and the appointment is to a child for life, and after his decease to his wife and children: but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving.

BY settlement, dated the 17th of April, 1796, made previously to the marriage of John James and Mary Barrow, widow, a leasehold house in Tottenham-Court-Road, of which Mary Barrow was possessed for a long term of years, and a bond to her, for securing 2,000*l.* and interest, were assigned to trustees, upon trust, after the marriage, subject to a bond debt of 150*l.* due by Mary Barrow, to receive the rents and interest, and to pay the same or permit the same to be received by Mary Barrow for her life for her separate use and benefit; and after her decease, then upon trust, that the trustees should stand possessed of the said messuage or tenement and of the said bond thereby assigned, and the money due thereon, for all and every the child and children of the said Mary Barrow by John Barrow, her then late husband, or by John James her said intended husband, to be begotten, in such shares and proportions, and to be paid at such ages and times, and in such manner, as she, the said Mary Barrow, should by her last will and testament in writing, or by

any writing purporting to be or in the nature of her last will and testament (notwithstanding the said then intended coverture) to be by her signed, sealed, and executed, *in the presence of two or more credible witnesses, give, order, direct, limit, or appoint; and that for such estate or estates, rights, and interests, as she, the said Mary Barrow, should think proper concerning the same respectively; and in case the said Mary Barrow should die without making any such gift, order, direction, limitation, or appointment, in manner aforesaid, or in case the whole of the said messuages or tenements and premises, or the money intended to be secured on the said bond, should not be fully and absolutely disposed of, then in trust to assign the said messuage or tenement, and to divide the monies to be received from the said bond or so much thereof respectively as should not be so disposed of by the said Mary Barrow, as aforesaid, unto and amongst all and every the child and children of the said Mary Barrow by the said John Barrow deceased, and to and amongst all and every the child and children of the said Mary Barrow to be begotten by the said John James, her intended husband, in equal shares, to be divided between them share and share alike, and to be assigned to such of the said children, as were or should be a son or sons at twenty-one, and to such as should be a daughter or daughters at twenty-one or marriage, which should first happen; and in case any of them being sons should be then infants, or being daughters should be under age and unmarried, at the death of the said Mary Barrow, then in trust to assign their respective shares thereof, when they respectively attain the age of twenty-one years or day of marriage; and in case there should be only one such child, then in trust to assign the said messuage or tenement and the money to arise by the bond, unto such only child at the day and time and in manner aforesaid; and in case the said Mary Barrow should die without any such child or children as aforesaid, living at the time of her death, then in trust for the executors or administrators of her, the said Mary Barrow.

The marriage took place.

Mary James by her will, dated the 11th of February, 1796, executed in the presence of three witnesses, reciting the settle-

CROMPE v. BARROW.

ment, so far as related to the said leasehold messuage and bond, and her power of appointment, and that part of the said 2,000*l.* secured by the bond had been received by her, and laid out in 1,000*l.* 3 per cent. Consolidated Bank Annuities, which were transferred to the trustees upon the trusts declared by the [*683] settlement concerning *the bond, did thereby order, direct, limit, declare, and appoint, that the trustees or the survivor, his executors, &c. should immediately after her decease stand possessed of the said messuage and premises in Tottenham-Court-Road and of the said 1,000*l.* Bank Annuities and the rents, interest, and dividends, thereof respectively, and of all money then due or owing upon, or which might thereafter be received by virtue of the said bond, in trust as to one moiety thereof for her daughter Frances James, wife of Robert Jeremiah Edward James, her executors, administrators, and assigns: but she ordered and directed, that the rents and profits of her said moiety of the said messuage and premises in Tottenham-Court-Road aforesaid should be received by the trustees or the survivor, &c. during the natural life of her said daughter, and paid to her for her own separate use; and as concerning the other moiety of the said trust estate and premises and the rents, interest, and dividends thereof, in trust to permit and suffer the same to be received by her son Charles Barrow for his life; but so as that the same may not be subject to any debts or incumbrances he then had, or might hereafter contract; and after his decease upon trust for such wife and children or child of the said Charles Barrow as he might leave behind him, in such shares as he should by any deed or writing with or without power of revocation, to be by him signed, sealed, and delivered, in the presence of two or more credible witnesses, or by his will in writing, to be by him signed and executed in the presence of two or more credible witnesses, give, order, direct, limit, or appoint, the same; and for want of such gift, &c. and as to such part of the said premises, whereof no such gift, order, &c. should be made, in trust to assign, transfer and pay, the same unto such wife and children or child, equally, if more than one; and if but one of them should be then living, then to assign the whole to such only one, her or his executors, &c. for all the residue of the term,

estate, and interest, which should be then to come therein: but in case the said Charles Barrow should die without leaving a wife or child him surviving, then, after his decease, it trust to assign the same unto her said daughter Frances James, her executors and administrators.

The testatrix died upon the 18th of June, 1798. At her second marriage she had six children living by her first husband: but *only two of them, viz. Charles Barrow, and Frances James were living, when she made her will; and she had no children by her second marriage. [*684]

The bill was filed by the trustees to have the rights of the defendants Charles Barrow and James and his wife under the power of appointment and the will ascertained.

The defendant Barrow by his answer admitted, that the power was exceeded by limiting to him for life, and afterwards to his wife and children, &c. and, for want of such wife or children, to the defendant Frances James, and that such limitations are void; and he stated, that he is entitled to a moiety of the trust estate; and that if the defendants James and his wife are entitled to any share in the said moiety, yet they are willing to relinquish their right in his favour.

The defendants James and his wife by their answer insisted, that the limitation of one moiety after the death of Charles Barrow to his wife and children or child is a void appointment; and that upon his death the defendant Frances James, her executors and administrators, will be entitled to the said moiety; and that such moiety so limited to Barrow for his life with such remainders over is to be considered as unappointed: but they consented to relinquish their right in the said moiety in favour of the defendant Barrow.

This cause stood a short time for judgment.

MASTER OF THE ROLLS:

The question is, whether there is a good execution of the power by this will. It is clearly good as to the interest for life given to the son: but then as to the gift over after his decease to his wife and children, who are not objects within the meaning of the power, they are strangers as much as any others with

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respect to this marriage settlement. The *Duke of Devonshire* v. *Lord George Cavendish*† is the only authority in favour of extending the power to grandchildren: though it is not a decision upon the point; and it was also considered as a case of election. But, except that case, all the cases, *Pitt* v. *Jackson*‡ [*685] *Routledge* v. *Dorril*§, where I decided the point upon very full consideration, and *Robinson* v. *Hardcastle*‖ determine, that where a power is given to distribute among particular objects, the power must be exhausted among those objects; and no other person, however nearly related to those objects, can be joined with them as such; and the children of the objects are no more objects than any other persons. Therefore, as to so much of this property as is not distributed among the objects of the power, it is to be considered as unappointed.

Declare, that, as to one moiety of the trust premises, the same is well appointed to Frances James, her executors, administrators, and assigns; and as to a moiety of the said messuage in Tottenham Court Road, to her sole and separate use; and as to the other moiety of the said trust premises, declare, that the same is well appointed for the benefit of the defendant Charles Barrow for his life according to the trusts of the said will and appointment; and that the appointment of the said moiety of the said trust premises after his death in trust for his wife and children is invalid; the same not being well appointed by the terms of the power in the said marriage settlement; and declare, that in case Charles Barrow shall die without leaving a wife or child surviving, the same according to the said appointment will belong to the defendant Frances James, her executors and administrators.

It was then suggested, that the ultimate limitation to Frances James depended upon the preceding estates given to the wife and children of Charles Barrow, and must fall with them; as the will must receive its general construction from the death of the testatrix.

† In the King's Bench, Hil. 22 Geo. III. stated 2 Term Rep. B. R. 245, in *Robinson* v. *Hardcastle*.

‡ 2 Bro. C. C. 51.

§ 2 R. R 250.

‖ 2 Term Rep. B. R. 241.

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I do construe the will at the death of testatrix; and I think, the ultimate appointment is good. If there is no wife or child of Charles Barrow, the manner, in which she has affected to execute the power, never takes effect at all. I have determined in *Routledge* v. *Dorril* according to *Robinson* v. *Hardcastle*, that [*686] if you give for life to a child, who is an object of the power, and then to the children of that child, and, in failure of issue, to a person, who is an object of the power, that is void: but the distinction of this case from that is, that this limitation over to Frances James is, if Charles Barrow should die without leaving a wife or child surviving. It fails, as far as it affects to give interests to the children: but is there any occasion to make it fail upon the other point, the gift over to a person, who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives: if Charles Barrow leaves no wife or children at his death, then the limitation over being to a good object shall take effect: if he does leave a wife or children, then it cannot take effect.

BROWN *v.* HIGGS.†

(4 Vesey, 708—719; Re-hearing, 5 Vesey, 495—508; Appeal, 8 Vesey, 561—576.)

1799.
April 11, 15.
July 1.
Rolls Court.
ARDEN, M.R.

Re-hearing, 1800.
July 7, 18.
ARDEN, M.R.

Appeal, 1801.
Nov. 19, 20, *and several other days.*

1803.
Dec. 10.
ELDON, L.C.

A testator bequeathed a leasehold estate (after an estate for life) to his nephew A. and the heirs male of his body lawfully begotten, and in default of such heirs to one of the sons of his nephew B. as A. shall direct by a conveyance in his life or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the remainder of the rent to such children of B. as A. shall think most deserving and that will make the best use of it, or to the children of his nephew C. if any such there are or shall be. A. dying in the testator's life, the bequest of the latter estate was established in favour of all the children of B. and C.

The question arising on the former bequest was reserved until the death of the tenant for life. The omission or failure of a trustee to exercise a power of appointment entrusted to him to be exercised for the benefit of others is not allowed in equity to defeat their interests. In such case a trust for their benefit may be implied in default of appointment.

HENRY BROWN by his will, dated the 13th of January, 1795, and duly executed to pass real estate, reciting, that by indentures [708]

† *Wilson* v. *Duguid* (1883) 24 Ch. D. 244, 53 L. J. Ch. 52.

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executed before his marriage he had settled upon his wife Rupertia Brown his estate at Lower Swell, to receive the rents and profits after his decease for her life, to prevent all dispute gave and bequeathed to his said wife the said estate at Lower Swell for her natural life, to receive the rents and profits thereof for her own use without being accountable to any one. After her decease he gave and bequeathed the above-mentioned estate at Lower Swell to his nephew John Brown and to the heirs male of his body lawfully begotten, "and in default of such heirs to one of the sons of my nephew Samuel Brown as the said John Brown shall direct by a conveyance in his life-time or by his last will and testament."

The testator also gave and bequeathed unto his nephew John Brown, in trust nevertheless for the uses after mentioned, his estate at Brize Norton; both which estates he declared were held by lease under the Dean and Chapter of the Cathedral Church of Christ, Oxford: that is to say, to permit his said wife Rupertia to receive all the arrears of rent due to him in his life, and the next half-yearly payment after his decease, subject to the annual rent to the College; and also to permit the tenants
[*709] of the Parsonage *Farm to pay to her yearly and every year during her natural life (except the years the leases for both the said estates are renewed, and the fines paid) the sum of 100*l.* sterling, at four quarterly payments, to begin the first quarter-day after the said half-yearly payment to his wife after his decease; and he authorized and commanded his said nephew John Brown to let the two estates at Brize Norton, as often as occasion shall offer, to the best advantage, and to apply the rents and profits to pay the rent and fines, as they shall become due, to keep the buildings in repair, to pay the principal and interest of the money owing upon his estate at Lower Swell and the Grange Farm at Brize Norton: then, subject to two legacies of 200*l.* and 100*l.* and some other charges, the testator made the following disposition as to the estate at Brize Norton:

"After the above trust is performed, I authorize and empower my said nephew John Brown to receive the remainder of the rent, that arises from my estate at Brize Norton, over and above the 100*l.* I have directed to be paid to my loving wife

Rupertia Brown, and to dispose of it in the following manner: that is to say; to take 100*l.* of it every year to his sole and separate use, and to employ the remainder of the said rent, after paying the annual rent to the College and the fines for the renewal of the leases and other necessary expenses about the farms, to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving and that will make the best use of it or to the children of my nephew William Augustus Brown if any such there are or shall be."

The testator gave and bequeathed to his wife all his plate, china, household goods, cattle, and chattels of what nature and kind soever they be, and every individual he should be possessed of at his decease, that is not otherwise disposed of above; and he appointed his wife Rupertia to be the residuary legatee and sole executrix.

The testator died without issue soon after the execution of his will. John Brown died in the testator's life; leaving a son and two daughters. Samuel Brown also died in the testator's life; leaving the following children; Henry Valentine Brown, who was *heir at law to the testator, Ann Wheeler, Martha Brown, [*710] Samuel Brown, Thomas Valentine Brown, and Charles Brown. The widow of the testator married Charles Higgs. William Augustus Brown, who was unmarried at the hearing of the cause, and Maria Sparrow were the next of kin of the testator, being his only surviving nephew and niece.

The bill was filed by the children of Samuel Brown against Charles Higgs and his wife, and the next of kin; praying, that the will may be established; that an account may be taken of the rents and profits of the Brize Norton estate, received by the defendant Higgs and his wife; and that what may be due upon that account and the future rents and profits may be applied in discharge of the money due upon the Lower Swell estate and the other charges according to the will; and that the surplus may be paid to the plaintiffs equally, or in such proportions as the Court shall direct; and that an account may be taken of the personal estate of the testator, with the usual directions.

The defendant Higgs and his wife by their answer submitted, that the whole of the said premises became vested in Rupertia

BROWN v. HIGGS.

Higgs; and that she and her husband in her right are entitled thereto free from any limitation made or intended by the will.

The next of kin by their answer submitted, that, if the surplus rents and profits of the Brize Norton estate are to be considered as personal estate undisposed of, they are entitled as next of kin.

There had been some dispute, whether the estate at Lower Swell was real estate, or leasehold: but it was agreed at the hearing, that it was leasehold; being the remainder of a term of 1000 years. It was charged with a mortgage for 100*l*. The Brize Norton estate was also subject to a mortgage for 450*l*.

Mr. Grant and *Mr. Lewis*, for the plaintiffs:

It is contended by the defendants, that the plaintiffs have no interest in neither the Lower Swell or the Brize Norton estate; a discretion being given to John Brown; which by his death in the life of the testator is at an end, and cannot be exercised. The only ground taken is, that for want of a possibility of exercising
[*711] the discretion the bequest *must fail. It is clear, in a Court of Equity a bequest never fails by the death of the trustee. His interest if he had survived the testator, makes no difference: with regard to the power of disposition he is a mere trustee. The disposition to him of the Lower Swell estate is lapsed; therefore the next is to take effect. In every such case, where the discretion cannot be exercised, the power devolves upon the Court, wherever the objects are so pointed out, that the Court can make a distribution among them. The Court will not select one: but where the class is described, out of which the selection is to be made, and the person who is to make it, is dead, the Court will divide it among them all. * *

That the disposition is not void by the death of the trustee has been decided by many cases. In *Harding* v. *Glyn*† a disposition in words almost the same as this was held a trust; and, the trustee having made a different disposition by will, it devolved upon the Court; and the description being "relations." the Court distributed it among the next of kin. In that case there was as much a discretionary power and a personal discretion as in this. * * They also cited *Witts* v. *Boddington*.‡

† 1 Atk. 469. See *post*, p. 334. ‡ 3 Bro. C. C. 95.

Mr. Graham, for the defendants Higgs and his Wife:

* * The disposition of the Lower Swell estate points to one son, not all. The testator indisputably meant a choice; and it is not like a general disposition in favour of the family of A.; the mode depending upon another person: but in this case without a choice there is no description of the person to take. Where one only is to take, it cannot be said, all are to take. Then who is to make the selection? The person to exercise that discretion being gone, it must fail. Where the gift is to one, the general intention and the modified intention are the same; the only difference being in the power of selection given to another person. This being a leasehold estate also, the limitation over after the limitation to the heirs male of the body of John Brown is void.

[712]

As to the point upon the other estate, John Brown might have known, which of the children of Samuel were most deserving: this Court cannot know that. There is however more in that point. It would have been impossible to get out of the authorities, had it stood as a disposition to the children of Samuel Brown only, without the alternative: but it is to be given to the one class or the other, clearly in the disjunctive. * * *

[713]

Mr. Stratford, for the defendants Higgs and his wife:

* * In *The Duke of Marlborough* v. *Lord Godolphin*,* Lord HARDWICKE takes notice of the cases, that have been cited on this occasion; and gives this general answer to them; that they are all cases, where the bequest amounted to a legacy to all the children. In all of them specific persons are pointed out. * * *Harding* v. *Glyn* turned upon the effect of the word "desire;" whether it should be considered recommendatory or jussory; and all those cases were considered in *The Duke of Marlborough* v. *Lord Godolphin*; and supposing them to be in point to this purpose, they were there contradicted, not lightly, but upon full consideration. It is a fallacy to say, the Court executed the power, where seeing the intention in favour of the children, they gave it to all.

[714]

Mr. Steele, for the next of kin. * *

* 2 Ves. sen. 61. See *post*, p. 336.

BROWN v. HIGGS. [715]

The MASTER OF THE ROLLS, during the argument for the defendant asked, if Samuel Brown had left only one child, whether that child would not have taken; observing, that there could be no selection there. It was answered, that the testator had not that case in contemplation; and that such son could not take: the preceding limitation being out of the way and the limitation over not being to any precise person existing, it is different from a precise limitation to another person.

Mr. Grant, in reply. * *

[716] MASTER OF THE ROLLS:

With respect to the point between the defendants, it is too clear in favour of the residuary legatee. The next of kin contend, that this is not sufficiently disposed of: but the testator has given to the residuary legatee all, that is not sufficiently disposed of. If he has not perfectly disposed of it, then she takes it. No man supposes, his legacies will lapse, or will not take place. It is the case of all lapsed legacies.

[717] With respect to the other point, as to the latter bequest I think, under the authority of *Harding* v. *Glyn* it is only a gift to the children of Samuel Brown and William Augustus Brown, or to such of them as John Brown shall think most deserving, if he thinks any more deserving than another: if he thinks no one more deserving than another, then it is to go to all, unless that is overruled by *The Duke of Marlborough* v. *Godolphin*. I should give that opinion, that it is to go to all, if it were not for the former part of the will as to the Lower Swell estate; as to which my great doubt is upon *The Duke of Marlborough* v. *Godolphin*, whether the testator intended any of the sons of Samuel Brown to take except such one as should be selected by John. It is clear, that if John Brown had survived the testator, in no case, that could happen, could this power have been exercised; for the limitation over of this leasehold property in default of heirs male of his body would have been absolutely void: but in the event, that has happened it is not void; all the limitations as to personal estate being clearly good, until one vests, carrying the whole interest. The question is, whether there was any

definite intention, that all the sons of Samuel Brown should take this estate. If John Brown had made a disposition to all, it would have been void. He was obliged to select one. He had power, if he thought fit to give it to any one son; and if he had gone beyond that, it would not have been well executed. But I have so much doubt upon that, that I will not determine this without making a case for the opinion of a court of law, if that is thought fit. I cannot with satisfaction determine it without asking that opinion. If that is waived, I should determine as to the other estate, that it falls exactly within the case of *Harding* v. *Glyn*; that if none are more deserving than another, it is a gift to them all. I cannot distinguish it from that case. I can find words of gift as to the one estate, but not as to the other; with respect to which the case of **The Duke of Marlborough* v. *Lord Godolphin* has changed my opinion. [*718]

The parties declining the proposal for a case as to the Lower Swell estate, and pressing for the decision of the Court, the MASTER OF THE ROLLS said, he would consider of it.

MASTER OF THE ROLLS:

July 1.

The only question in this cause, that is now ripe for judgment, is as to the Brize Norton estate, with respect to so much of the interest in that estate as is not peculiarly appropriated by the will. The point as to the Lower Swell estate is not now ripe for decision. As to that there is no occasion to make any declaration now; because Rupertia Higgs, to whom the rents and profits of that estate are given for her life, is now living. It will be time enough at her death to decide that question. The fact being, that John Brown died in the life of the testator, a question may arise, whether anything vested in him or his heirs male. Probably it may be held lapsed, as being an absolute interest in John Brown, if it is leasehold estate. Supposing it to be real estate, the question will be, whether the limitation to one of the sons of Samuel Brown in default of heirs male of the body of John Brown can be construed a gift to all the sons, or merely to such son as John Brown should appoint; in which case it would fail. I desire not to be understood to give any opinion upon that point.

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The next question, as to the Brize Norton estate, is, whether the surplus rents, after the charges imposed by the will, so given to such children of Samuel Brown as John Brown shall think most deserving, and that will make the best use of it, or to the children of William Augustus Brown, if any such there are or [*719] shall be, is a *gift to all the children, or to such of them only as the testator's nephew John Brown, who died in his life, should appoint. If the former can be collected as his intention, the death of the trustee will make no difference. If that intention cannot be collected, the selection not having taken place, whatever the reason of its failing may be, the bequest must fail with it. Upon the true construction of this will I am of opinion, it is equivalent to saying, he gives it to the children of Samuel Brown or of William Augustus Brown, with a power to John Brown to select any he thinks fit and to exclude the others; and it is too much to contend, that nothing is intended for them exclusive of the appointment of John Brown. The fair construction is, that at all events the testator meant it to go to the children; and these words of appointment he used only to give a power to John Brown to select some and exclude the others.

I will make no declaration as to the Lower Swell estate: and I desire, that this declaration shall not be considered as at all affecting that. They stand upon very different grounds; and at present I am inclined as to the Lower Swell estate against the children of Samuel Brown. The one is given to certain objects, with a power to another person to distribute it amongst such of them, as he thinks most deserving; which does not exclude them, if that power is not exercised. The other is a gift to some one as that person should appoint.

The decree declared, that in consequence of the death of the testator's nephew John Brown in the testator's lifetime the rents of the estates at Brize Norton subject to the trusts thereof declared by the will were thereby well bequeathed in trust for all the children of the testator's nephew Samuel Brown and the children of his nephew William Augustus Brown, if any such there are or shall be; and an inquiry was directed, what children of Samuel Brown and William Augustus Brown

respectively were living at the death of the testator, and what children are now living; and the consideration of all farther directions as to the Lower Swell estate was reserved.

BROWN v. HIGGS.

1800.

The cause came on to be re-heard, upon the petition of the defendants Higgs and his wife, on the 7th and 18th July, 1800, as reported at 5 Vesey, 495—508: [5 Ves. 495]

Mr. Stratford and *Mr. Fonblanque*, for the defendants:

First, these defendants are aggrieved by this decree; as no declaration is made as to the Lower Swell estate: secondly, as the Brize Norton estate is declared well bequeathed in trust for all the children of Samuel Brown and William Augustus Brown. * * *

Mr. Stanley and *Mr. Bell*, in support of the decree: [497]

The question as to the Lower Swell estate does not now arise. That cannot be ripe for decision till the death of Mrs. Higgs: but her husband may preserve his right by assigning it immediately to a trustee.

With respect to the other part of the case, the construction, that has been put upon it by the decree, is the most rational, and the nearest to the intention, that can be supposed. Though a power of selection was given to John Brown, the interest of the children does not depend entirely upon the selection to be made by him. All the children of Samuel Brown and William Augustus Brown were in the testator's contemplation. The fair construction is, that John Brown was in fact made a trustee; and had something more than a *mere power of [*498] nomination and selection; and then there are many authorities for the proposition, that the trust shall not fail by the death of the trustee. * * *

THE MASTER OF THE ROLLS: [499]

As to the Lower Swell estate, what right have I to give an opinion upon that? It is a legal estate. It is not in a trustee. I am not called upon to make a trustee convey. An ejectment may be brought.

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Mr. Stratford in reply:

Certainly as to that estate an ejectment might be brought. No declaration of any right as to that is called for.

With respect to the other estate, the great difference is as to what may be supposed a trust, and what, a power.

[500] [*Note.*—The principal cases cited by counsel are fully referred to in the judgment.]

MASTER OF THE ROLLS:

July 18.

I am extremely glad this cause has been reheard; for it has afforded me the opportunity of looking very narrowly into the case of *The Duke of Marlborough* v. *Lord Godolphin*.* The principal case has been very well argued; and I have had the opportunity of giving myself every information upon a point, certainly of no little difficulty and doubt: but notwithstanding the arguments, which for a time shook my opinion, upon full consideration I think, the decree ought not to be altered.

I have looked into the case I mentioned; and if my decree was contradictory to that, I should have paused, before I should have held, such a decree ought to stand against the authority of Lord HARDWICKE, in a cause upon which his Lordship must have taken very considerable pains, from the great magnitude of the property; and I am very glad to find, I can affirm my decree without infringing upon the authority of that decision. If it would have that effect, I should not set up my own opinion against that of so great a man, in a cause of that nature, and which must have undergone so much consideration by him.

It is to be observed upon the circumstances of this case, that the whole interest the testator had in the Brize Norton estate is given to John Brown upon certain trusts; and after those trusts are performed he authorises and empowers him to dispose of the surplus rent in this manner. Upon this disposition and the facts, that have taken place, the question is, whether this sentence in the will, upon which the question arises, is to be considered as merely giving John Brown a power if he thinks fit,

* 2 Ves. sen. 61. See *post*, p. 336.

to give the profits of the farm, of which he was the trustee, to the children of Samuel Brown or William Augustus Brown, or whether upon the true construction it is any thing more or less than a mere trust in him, with a power to single out any he might think more deserving, but a gift to him in trust for those children at all events; and I am of the same opinion, upon very full consideration, and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown; and that his non-exercise of that power, or the circumstance of his being incapable of exercising it, *will not [*501] prevent the objects of the testator's bounty from taking in some manner; though the power of distribution on account of the death of the trustee cannot now be exercised.

There is no doubt as to the question between the residuary legatee and the next of kin. No petition of rehearing has been presented by the next of kin; and most unquestionably, if this interest is not well given by the will, it passes by the residuary disposition.

As to the point, which is the subject of the rehearing, the counsel have very properly endeavoured to prove, this was not a trust, but a power. If that is so, their argument must prevail; for I freely admit, the power has not been exercised; and it is such a power as, I agree, the Court cannot exercise: and if it has not been exercised by the party, it does not devolve upon the Court. The question therefore is, whether there is anything, from which an intention appears, that the children of Samuel Brown and William Augustus Brown were the objects, to whom the testator meant to give this interest, with a power only in John Brown to select or apportion, if he saw any reason to give a preference.

The two cases, most relied on upon both sides, are *Harding* v. *Glyn*, in support of the decree, and *The Duke of Marlborough* v. *Lord Godolphin* against it; as affording a proof, that words of this sort are to be construed as powers, and not as trusts. I have taken some time to look into those cases, and *Witts* v. *Boddington*; † in order to be quite sure, that the real state of those cases agrees with the report; and I have extracted the

† 3 Bro. C. C. 95.

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small differences, that do appear in the Register's Book, as contrasted with the printed reports. First, as to *Harding* v. *Glyn*. It is not reported by itself in Vesey, but is mentioned in the argument of *The Duke of Marlborough* v. *Lord Godolphin*. This case is reported in Atkyns, but extremely short; and the statement pretty nearly agrees with the other book. But I will state it from the Register's Book.†

The testator gives to his wife all his estate, leases, and interest, in his house at Hatton Garden, and all the goods, &c.; but did desire her at or before her death to give such lease, &c.

[*302] unto and amongst *such of his own relations as she should think most deserving and approve of. The bill states that the wife made her will; and thereby bequeathed to the plaintiff Elizabeth Stacy 500*l.* to the plaintiff Harding Stacy 500*l.*; and then proceeded thus: "Item, I give and bequeath to Henry Swindell of Tongeson all my estate, right, title, and interest of and in all my messuage in Hatton Garden;" and which said messuage is the house, which her husband bequeathed in manner aforesaid; and the testatrix gave to Caleb Harding all her plate and 500*l.*; and after giving several legacies gave the residue to Rokeby and Claget; and made them executors; and soon after died, without having given at or before her death the goods in the house in Hatton Garden, or without having disposed of any of her husband's jewels to his relations; though the plaintiffs charged, that the said testatrix Elizabeth Harding not having any property in the said furniture and jewels, but only for life, and a limited power of disposing of the same to her husband's relations, which she has not done, therefore they ought to be distributed among his relations according to the Statute of Distributions of Intestate's estates. The decree declares, that the defendant Henry Swindell the son is entitled to the leasehold house in Hatton Garden devised to him by the will of the said Elizabeth Harding pursuant to the power given her by the will of her husband. But it does not appear to me, that this person, to whom that house was given, was one of the next of kin of the testator. The decree then proceeds to declare, that so much of the household goods in Hatton Garden and other personal estate

† Register's Book, 1738, A.

of the said Nicholas Harding, devised by his will, which she did not dispose of according to the power given her thereby, in case the same remain in specie, or the value thereof, ought to go to the next of kin of the testator, and be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding; and that the devise of the plate to Caleb Harding pursuant to the power given by her husband's will is a good devise.

The Court seems to have held, that under the word "relations" she might, if she thought fit, include persons, not next of kin; but as to so much as she had not disposed of, it would go to such persons as were next of kin according to the Statute of Distributions.

The counsel for the defendants were so conscious of this case [503] pressing, as it certainly does upon all principles, upon the determination of the present case, that they contended, that if that case does bear upon the present, it was overruled by *The Duke of Marlborough* v. *Lord Godolphin*; and indeed if that case was contradictory to it, that might have been argued. But I do not find any opinion of Lord HARDWICKE tending to shew, he disapproved of the former case. *Harding* v. *Glyn* appears to differ in no other respect, but that in that case there are words of request and desire; for the power was as extensive. There is as great power of selection. It does not fix upon any particular persons; and it could go only to such as the person having the power should think deserving and approve of; and but for the words of desire and request there is no difference between this case and that. The Court could not have exercised for the testatrix in that case that power of approbation and selection.

[After referring to some other cases which had been cited the MASTER OF THE ROLLS continued:]

Then it comes to the only question; whether this is a trust or [505] a power. The distinction between a trust and a power is very nice, I admit; when we come to see *The Duke of Marlborough* v. *Lord Godolphin*. In that case it was held merely a power. I confess, if it were not for that authority, I think, there is great reason to contend, that it was an absolute gift to the children,

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with a power of *selection only. The report is nearly accurate. The testator by his will gave an absolute legacy of 30,000*l.* to his wife. He appointed executors; and made his eldest son residuary legatee. The Register's book † states the words of the codicil as follows:

"My farther will and meaning is, that the legacy given and bequeathed by this my will to my wife shall be to her own use and benefit for and during her natural life only; and from and after her decease the said whole legacy be divided and distributed amongst such of my children and in such manner and proportions as the said Countess shall by any deed or instrument in writing or by her last will direct and appoint, and to no other use or purpose whatsoever; and for the better performance of the same my will is, that the said legacy and every part and parts thereof shall from time to time be placed out and disposed of by my executors, and the survivor and survivors of them, with the approbation of the said Countess and for her benefit."

Lord HARDWICKE upon consideration of this case was of opinion, that it was a mere power, and not a trust: the legacy was to such children as she should appoint, and to nobody else; he could not find any intention in favour of the children, except as they were objects of her bounty, as well as of his. His Lordship does not, as I have before observed, seem to quarrel with *Harding* v. *Glyn*; and he considered it merely upon the question, whether it was a trust or a power.

If therefore this is a power, the power not being exercised, no person can claim to have it exercised at all. I think, I am also warranted by *Harding* v. *Glyn* to say, that, wherever the whole interest is given, as it is in this case as to the Brize Norton estate, and in words, which, I see, were much relied upon at the former hearing, viz. "to employ," he is clearly made a trustee, and for the whole interest. I cannot think, the words "authorise and empower" can have the effect of turning this into a mere power. Such words are little more than a declaration, what are the trusts, for which that person is already made a trustee. What does he authorise and empower him to do? To receive the remainder of the rent to take 100*l.* a year to himself, &c. Those

† Register's Book, 1750, 97.

words seem *inserted, because he was to be a trustee for himself to a certain point. I was of opinion before, and upon full consideration I am still of opinion, that the Court are bound under those words to hold, that it was the intention, that John Brown should give to the children of Samuel Brown, or William Augustus Brown; with a power to select, as he should think proper; that the testator did not mean, any part of the trust should remain unexecuted, as long as there were children; and the fair construction is to give it to the children. * * * BROWN v. HIGGS. [*5 Ves. 507]

With respect to the Lower Swell estate, I desire, it may not be understood to be my present opinion, that there is a trust as to that. My opinion, as far as it goes, without deciding a point, which I am not obliged to decide, is with the defendants. But I shall make no declaration as to that. [5 Ves. 508]

This cause was brought on upon Appeal by the defendants Higgs and his wife in November, 1801, as reported at 8 Vesey, 561-576: 1801. [8 Ves. 561]

The cause was very fully argued by *Mr. Romilly*, *Mr. Fonblanque* and *Mr. Stratford*, in support of the appeal; and by *Mr. Mansfield*, *Mr. Stanley*, and *Mr. Bell*, for the decree. * * * [562]

[The LORD CHANCELLOR (Lord ELDON), after referring to certain points which do not now require further notice, proceeded:] 1803.

The next question is, whether the children of Samuel Brown, and William Augustus Brown, if he shall have any, or either, and which, of them, are entitled to the leasehold estate of Brize Norton, subject to the prior trusts, before the residuary interest can be collected. That is a most difficult question. It is perfectly clear, that, where there is a mere power of disposing, and that power is not executed, this Court cannot execute it. It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. One question therefore is, whether John Brown had a trust to execute, or a power, and a mere power. But there are not only a mere trust and a mere power, [570]

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but there is also known to this Court a power, which the party, to whom it is *given, is entrusted and required to execute; and
[*571] with regard to that species of power the Court consider it as partaking so much of the nature and qualities of a trust, that if the person, who has that duty imposed upon him, does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place. Upon that principle the case of *Harding* v. *Glyn* † proceeded. But that case cannot be got rid of by saying, it is a singular case, and, that it is difficult to reconcile all subsequent cases with it; for that case has been treated as a clear authority, probably for the whole, certainly by my own experience for a very considerable part, of the time elapsed, since that judgment was pronounced. Mr. Joddrell's note of that case is to the following effect:

"This case was argued upon three points: first, whether by the devise the property vested solely in the wife: 2ndly, whether after her death it was to be considered undisposed of: 3rdly, if not, who were entitled under the will. It is plainly intended, that the wife should take beneficially only during her life. I mark the word 'beneficially;' for the first words vest it in her absolutely. The word 'but' is a restriction. Upon the second point: it is not undisposed of; for there are no technical words: but it is sufficient, if the intention appears; and the word 'desire' amounts to a devise. Thirdly, if the description of persons is so uncertain, that it is impossible to know, who are meant, as if it had been 'his friends' it would be void for uncertainty. But the word 'relations' is a description known in the law. Shall her neglect make it void? It is a trust; and she not having executed
[*572] it, it devolves upon this Court. It is not to *go according to the Statute of Distributions: but the devise is not void; and that statute is a good rule to go by; and as equality is a principle of equity, it shall go to such of his next of kin as were alive at the death of his wife."

On the other hand it was insisted to be a mere power; and the argument of *Mr. Chute* is very well conceived; for the argument

† 1 Atk. 469.

is, that, if it is a trust, it ought to be so at the death of the testator for those, who were to take at the death of his wife; and if not, it is a mere power, and the wife not having executed it, it is a void devise; and so to go according to the Statute, as undisposed of: so either way it ought to go to those, who were the next of kin at his death; and 1 Vern. 35, is cited upon that. This argument is added to by this consideration; that if it was a trust, and the relations at the death of the testator were to take, the gift to Swindall could not be good; for he was not one of the next of kin at the death of the testator, or of his wife; but was the son of one of the next of kin. The Court appears to have taken this course. The wife took the whole legal interest, in terms what may be called a power to give to his relations; and though in ordinary cases that means next of kin at the death of the testator, yet, where a will itself affords the means of avoiding the inconvenience of a construction giving a greater latitude to that word, the Court holds, that persons more remote may take; viz.: that she might give to anyone *de facto* answering the description. Swindall might be a legatee; and if she had given all to persons, of whom none were next of kin, but all were relations, it would have been good.

The next consideration was, what became of that property she did not give to anyone? Was it undisposed of? If so, of necessity it would have gone to those, who were *next of kin at the death of the testator, or the representatives of any, who died in the life of the wife. But the Court seem to have considered, that there was a duty imposed upon the wife, and that a latitude was to be given, to enable her to discharge the duty according to the power, and which she was desired and commanded to discharge. Then having the power of naming during her whole life, the Court said, those relations, who were relations at her death were to take. That could not be, because they were strictly *cestuis que trust*; but, those, to whom she might have given the instant before she died, were those, to whom she ought to have given. She was entrusted with a power; and then they applied the doctrine of the inconvenience of applying it with more latitude than relations according to the statute existing at that period. That was a case therefore of a power in her, which he

[*573]

BROWN v. HIGGS.

required her to execute; which enabled her to give to any relations; and the Court, looking at it as a power coupled with a duty to execute it, were bound, as she had not executed it, to execute it; and consistently with its own rules, not giving more latitude to the word "relations" than in ordinary cases; and adopting what is supposed her duty: viz. giving to those, who stood in that character at her death; and the case establishes this; that though upon a mere power this Court will not interpose, if it is not executed, yet if it is so given as to vest the power in the person having the whole legal interest, and to call upon that person to execute the purpose, sufficiently expressed to make it the duty of that person, if he fails in that duty, the Court will execute it for him. * *

[574] The principle of *Pierson* v. *Garnet*,† of *Richardson* v. *Chapman*,‡ which went to the House of Lords, and all these cases, is, that, if the power is a power, which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the Court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those, for whose benefit he is called upon to execute it.

In that view of this case, with all the doubts and difficulties I have stated, I think, the conclusion of the MASTER OF THE ROLLS is the right conclusion. I do not know, whether this is a pro-

[*575] perty of great value: if it is, *I should very much wish, as Lord ALVANLEY does, that this cause should go to the House of Lords. I do not say, it is of the first impression in point of principle: but there is as much difficulty as in any case of bringing it within the reach of the principle. The devise of the Lower Swell estate is conceived in terms, that ought to have a fair operation upon the devise of the Brize Norton estate; for the power in the same will as to the Lower Swell estate, if not a mere discretionary power, looks as like it as words can render it. The words as to the Brize Norton estate leave it extremely difficult except by im-

† 2 Bro. C. C. 38, 226; Finch's Pre. Ch. 210.

‡ 5 Bro. P. C. 400.

plication to say, John Brown had the whole of the legal estate. There is not a single act he is directed to do, that is not directed in terms personal to himself. But when it is considered, that they are to be done during the continuance of leases, that might not expire in his life, and to be renewed, the true construction is, that the testator meant to give him the absolute interest as effectually as if it was given to his executors and administrators; and that those claiming interests under him should continue to do the several acts. Then the construction of Mrs. Higgs must be this; that what is not given will fall into the residue. But then the question is upon the whole will, was that the intention? Supposing John Brown survived, what makes that improbable is, that partial interests in the rents and profits are given to this residuary legatee. Next, the acts John Brown was meant to do were those, by which in one year he was to give to the children the rents and profits: in another year he might give the whole rents and profits to the children: in another he might give part to some, and none to others: in another, part to the children, part to the wife.

Upon the probable intention my inclination to the opinion of Lord ALVANLEY is too strong to permit me upon any doubts I entertain upon this obscure will to say, *there is not intention [*576] enough to justify the declaration that has been made. In fair construction also of the clause comprehending the children of William Augustus Brown, the word "or," may be construed, as if it was "and;" which will get rid of *Mr. Romilly's* argument upon the possible profligacy of the children of William Augustus Brown. I doubt also, whether this will can be stated to be like those cases, where something is required to be given to all.

The Duke of Marlborough v. *Lord Godolphin*,† is certainly very difficult to reconcile with *Harding* v. *Glyn*, or with this case. But the question is not, whether one case is to be reconciled with others, but, whether all the cases have gone upon a principle, which professes to save whole *Harding* v. *Glyn*. Lord HARDWICKE in *The Duke of Marlborough* v. *Lord Godolphin* does not say, that, where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case

† 2 Ves. Sen. 61.

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this Court would not act: but he collected from the scope and object of the disposition in that case, taken altogether, the opinion, that it was a case, in which the person having a power to dispose of the sum of 30,000*l.* had a mere power, not clothed with any duty requiring her to execute it; and therefore as to what was not disposed of the Court could not interfere.

However difficult it is to reconcile all the cases upon this subject, I think, the principle I have stated is the principle, upon which the Court ought to proceed; and, adopting that, I have not confidence enough in the doubts I have entertained, and shall never cease to entertain, upon this will to reverse this decree.

The decree was affirmed.

[*Note.*—This decision was affirmed on appeal to the House of Lords in 1813.]

1799.
July 10.

Rolls Court.
ARDEN, M.R.

[748]

KIRBY *v.* POTTER.*

(4 Vesey, 748—752.)

Legacy of "1,000*l.* out of my Reduced Bank Annuities" held pecuniary: the Court leaning against holding a legacy specific, unless clearly intended.

"Of my stock," or "in my stock," or "part of my stock," will make a legacy specific.

THE testator by his will, dated the 24th of December, 1795, after giving directions as to his interment, desiring, that the interest of 100*l.* of his Bank Annuities be applied from time to time to keep his monument in repair, and directing, that all the money given by him be paid within six months after his decease, among several legacies, all pecuniary, gave to the poor of the parish of Chelsea 100*l.* to be laid out in stock; and to Mrs. Ann Kirby, who had lived many years as housekeeper to him the sum of fifty pounds for her integrity and care. The will then proceeds thus:

"To whom I do also give and bequeath all my leasehold estate consisting of four houses," situate at Chelsea, "and to whom I moreover give and bequeath my annuities in two separate

* *Bothamley* v. *Sherson* (1875) L. R. 20 Eq. 304, 44 L. J. Ch. 589.

orders of thirty pounds per annum payable out of his Majesty's receipt of Exchequer for and during the remainder term of my interest therein. I give and bequeath likewise to her son Francis Kitching Kirby [the sum of six hundred pounds and] my annuity being a separate order No. 931 of ten pounds per annum payable also out of his Majesty's receipt of Exchequer for and during remainder term of my interest therein."

By this will, which was duly executed according to the Statute of Frauds, a real estate was devised to the defendant who was also appointed executor and residuary legatee. The words inclosed between brackets were erased: but no notice was taken of the erasure in the attestation or otherwise.

The testator made the following codicil, dated the 26th of April, 1798.

"My intention and will by the codicil added hereto is to give to Francis Kitching Kirby a legacy of one thousand pounds out of my Reduced Bank Annuities 3 per cents by my executor within one month from my decease for his integrity, sobriety, and good behaviour, and deserving person in every respect."

The bill was filed by Francis Kitching Kirby, who was the son of Ann Kirby, claiming under the codicil 1,000*l.* as a *pecuniary [*749] legacy; and the only question was, whether that legacy was pecuniary or specific.

The testator had above 3,000*l.* 3 per cent. Reduced Bank Annuities, besides other stock.

The plaintiff went into evidence, that at the date of the codicil the value of 1,000*l.* Reduced Bank Annuities was no more than 470*l.* sterling.

The MASTER OF THE ROLLS desired the counsel for the plaintiff to go upon the words only; and added that he could take no notice of what had been struck out of the will.

Mr. Piggott, for the plaintiff:

The intention appears clearly to give 1,000*l.* in money. The terms the testator has used, expressing high regard for this legatee, shew the object to be to increase rather than diminish his bounty. The direction to pay the other legacies in six

KIRBY v. POTTER.

months was to give time for collecting the personal estate. If the testator had only that precise sum in this fund, the defendant might have a plausible argument; but the fact opposes that.

Mr. Grant and *Mr. Stratford*, for the defendant:

I lay out of the case all argument from the legacy supposed to have been given by the will. It does not appear to have been struck out, when the testator made the codicil, nor at what time it was done. It might have been long before. It does not appear what the fluctuation of his intention might have been between the dates of the will and the codicil. The legacy given by the codicil cannot be argued to be a substitution at the moment of a better legacy for one given by the will. The annuity of 10*l.* remains standing in the will. The testator knew perfectly well how to give pecuniary legacies and legacies of stock. He directs, when his pecuniary legacies are to be paid. The phrase in the codicil is no where made use of in the will. In that the word "sum" occurs, which points to money. If he had said "1,000*l.* my Bank Annuities," it would be clearly specific. A legacy of 1,000*l.* Bank Annuities would not be so specific as "1,000*l.* out of my Bank Annuities." That shews, he
[*750] had more. If he meant a *pecuniary legacy, what possible reason could there be for giving it out of the Bank Annuities? The allusion to the stock is introduced for no other purpose than to make it specific. The direction as to the month is material. If it is a pecuniary legacy, why is that annexed to it any more than the others? There is a plain obvious meaning, supposing it a legacy of stock; that the legatee might have the benefit of the accruing dividend; which arises without any effort or pains of his own. Money would not be so certainly productive of interest. It cannot be without some intention; and no other can be resorted to but an intention to give stock. The proof of the value of the stock at the date of the codicil is not material. The testator did not suppose he should die upon that day. A legacy of a cross to be taken from a necklace is clearly specific: so a horse out of his stud at Newmarket. *Danvers* v. *Manning*.†

† 2 Bro. C. C. 18.

Upon *Purse* v. *Snaplin*† and all the other cases it must be said the word "my" makes it specific. The act to be done by the executor is of the nature of the thing given: that is, the stock is to be transferred within one month. It was reasonable to give the executor time to go to the Bank and make the transfer. That may be the reason.

Mr. Piggott in reply, was stopped by the Court.

MASTER OF THE ROLLS:

I am of opinion with the plaintiff; but not upon the will and erasure. That rather makes against him; for in the will the expression "the sum" is used. Then the phrase being varied in the codicil, and this legacy being given without the expression "the sum," if I was to decide upon that, I should be against the plaintiff. But for the reasons given by *Mr. Grant* it would be a very erroneous ground of decision to call in aid such doubtful points concerning the time, when the erasure was made, and what was floating in his mind. Therefore I lay that entirely out of the case, and decide upon the construction of the codicil itself. I admit as to the legacy in the beginning of the will, the construction must be, that it is 100*l.* Bank Annuities. If the legacy given by the codicil had been "of my stock," or "in my stock," or "part of my stock," I should have held it clearly a specific gift of an aliquot part of the stock. The pecuniary legacies *are directed to be paid within six months. The testator thinking he | *751 |
had not done sufficient for the plaintiff by the annuity of 10*l.* but that for his integrity, sobriety, and good conduct, he deserved something more, gives him this legacy by the codicil. A gift of 1,000*l.*, no doubt, means 1,000*l.* sterling: but undoubtedly that may be explained. It is said, the words, that follow, "out of my Reduced Bank Annuities 3 per cents." are synonymous to the words I have stated: "part of my stock," &c. They are not synonymous by any means; for 1,000*l.* may be raised by selling so much stock as would produce that sum, or by borrowing upon it. Suppose, it was 1,000*l.* out of a leasehold house: it would be a charge. The direction as to the

† 1 Atk. 414.

KIRBY v. POTTER.

month is very material, if slight circumstances are to be called in aid. Why should one month be mentioned? Why should not the transfer be immediately? Why not as soon as conveniently might be; giving him all the accruing dividends in the mean time? The only effect of that direction would be to deprive him of the dividend; which could not be the intention. There certainly must be time for the actual transfer: but the testator might have given the plaintiff all the dividends. Every one knows, a specific legacy of a *corpus* passes from the death of the testator. It vests immediately from that time. There is a very untechnical expression used with regard to stock. There is literally no such thing as 100*l.* stock. The 3 per cents. are only perpetual annuities, granted for ever, redeemable by the public upon the payment of a certain sum of money. Knowing, however, that in common parlance people speaking of stock will so express themselves, we must apply it. But whenever there is a legacy of a given sum, there must be positive proof, that it does not mean sterling money, in order to make it specific. If this legacy had been expressed thus, "part of my Reduced Bank Annuities," or "in my Reduced Bank Annuities," I could not have considered, that the testator meant any thing but an identical part of that *corpus:* but when the phrase is "1,000*l.* out of my Reduced Bank Annuities," the sense is, that the executor shall raise 1,000*l.* by selling so much of that stock; and this being a fund, to which he can have immediate recourse, he is ordered to do so within a month. Therefore, though in my private opinion there is great doubt, what he meant, I must hold this to be a legacy of 1,000*l.*, to be raised and paid out of that fund, as a specific security and more easily come at, than a legacy out of his estate in general might have been.

[752] Declare, that the sum of 1,000*l.* sterling is to be raised out of the testator's 3 per cent. Reduced Bank Annuities, and paid to the plaintiff: let the Master compute interest upon it at the rate of 4 per cent. from the end of a month after the testator's death. I am not inclined to give the plaintiff costs. He ought to be satisfied with his legacy: but, I think, I must according to the course of the Court give him costs out of the estate.

NORMAN *v.* MORRELL.†

(4 Vesey, 769—770.)

1799.
July 10, 15.

Rolls Court.
ARDEN, M.R.

[769]

Real estate devised subject to an express charge of debts must be applied in payment of debts in exoneration of a pecuniary legatee, whose legacy is not charged on the land.

SARAH LONG by her will, dated the 20th of February, 1793, and attested by three witnesses, declared, that as to her temporal estate she gave and disposed thereof, as follows. She then gave some pecuniary and specific legacies, and among them to Mary Norman a tea chest; and she gave to her servant Johannah Gardiner an annuity of 40*l.* during her life: and she charged the said annuity upon all her real estates, with power to recover it by distress and sale of the goods, chattels, or stock, upon all or any part of her real estates. The testatrix then disposed of her wearing apparel, and gave some other pecuniary legacies; and subject to the said annuity and legacies and the payment of her just debts, funeral, and testamentary expenses, and the debts of her late brother, she gave all her real estate to James Morrell, his heirs and assigns for ever: and she also gave and bequeathed to him all the rest and residue of her personal estate not therein before disposed of; and appointed him sole executor.

By a codicil, dated the 10th of September, 1795, the testatrix gave some other legacies, specific, and pecuniary, the latter in figures, and among them there was one to Mary Norman; and the bill was filed by her against the executor, claiming under the codicil a legacy of 800*l.*; and praying, that the usual accounts may be taken; and, if the personal estate shall be insufficient to answer the said legacy, that it may be declared, that the plaintiff is entitled to satisfaction of what shall be found due to her in respect thereof out of the real estate of the testatrix and the rents and profits thereof, or at least to the extent of the personal estate *exhausted in payment of such of her debts and legacies as shall appear to have affected her real estate. [*770]

The defendant by his answer insisted, that the legacy given

† See *Eate* v. *Bate* (1890) 43 Ch. D. 600.

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by the codicil was only 300*l.*; the first figure being "three" and not "eight."

With respect to the other part of the prayer of the bill the answer stated, that the personal estate amounted only to 2,000*l.*; and the mortgages and bond debts alone amounted to 4,000*l.*; in payment whereof and of the funeral expenses the defendant exhausted the personal estate, except what was specifically bequeathed.

Upon the first point, * * an issue was directed, whether the legacy given to the plaintiff by the codicil was 800*l.*; and if not, with liberty to indorse any other sum.

Upon the other question the decree directed that the assets should be marshalled.

1799.
July 22.

LOUGHBOROUGH, L.C.

[800]

BRANDER *v.* BRANDER.*

(4 Vesey, 800—802.)

The 5 per cent. annuities of 1797 created upon the subscription of the Bank for the public service, and in pursuance of a resolution of the Bank divided among the proprietors of Bank Stock *pro ratâ*, are considered as an accretion to the capital; and therefore a person entitled for life can have the benefit of it by way of dividend only.

By the decree pronounced in this cause John Spicker Brander was declared entitled to the residue of the testator's personal estate for his life, subject to an annuity. The residue consisted of 9,996*l.* 2*s.* 3*d.* Bank 3 per cent. Annuities: 10,000*l.* Bank Stock: 1,000*l.* Bank 5 per cent. Annuities of 1797; and 351*l.* 1*s.* 9*d.* cash; standing in the name of the Accountant-General in trust in the cause. The testator died in 1787.

The fund of 1,000*l.* Bank 5 per cent. Annuities of 1797 arose from the transaction between government and the bank in that year: the bank having subscribed and paid out of their funds for the service of the public the sum of 1,000,000*l.*; and received for the same 1,125,000*l.* 5 per cent. Annuities of 1797. The bank lately, in 1799, came to the following resolution; that a participation of the sum of 1,125,000*l.* of the 5 per cent. Annuities of 1797 standing in the name of the Governor & Co. of the Bank of England, be made among the present proprietors

* *Bouch* v. *Sproule* (1887) 12 Ap. Ca. 385, 392, 56 L. J. Ch. 1037.

of Bank Stock *pro ratâ* according to their respective interests: the transfer of the same to be made upon the 1st day of June, 1799. In pursuance of this resolution the bank transferred 1,000*l.* 5 per cent. Bank Annuities of 1797 to the Accountant-General, in trust in this cause; being the proportion to which John Spicker Brander was entitled under such resolution in respect of the said 1,000*l.* Bank Stock.

A petition was presented by John Spicker Brander and by John Lloyd, the personal representative of the annuitant; praying, that out of the sum of 351*l.* 1*s.* 9*d.* cash, the arrears of the annuity may be paid; and that the residue thereof may be paid to the *petitioner John Spicker Brander; and that the [*301] whole of the interest and dividends due and to grow due upon the said 10,000*l.* Bank Stock and 9,996*l.* 2*s.* 3*d.* Bank 3 per cent. Annuities may from time to time be paid to the petitioner Brander during his life; and that the said 1,000*l.* Bank 5 per cent. Annuities of 1797, together with the interest and dividends due and to accrue due thereon, may be transferred and paid by the Accountant-General to the petitioner Brander.

Mr. Mansfield and *Mr. Fonblanque*, for the petition, contended, that the bank have no right to increase their capital; and if it could be clearly made out, that the capital of the bank in 1797 was full to the extent authorised, every thing *ultrà* was divisible among the proprietors.

LORD CHANCELLOR:

If I am to go upon your principle, I must hunt it back; and see, to what part of that saving each is entitled. I have often considered this question; and it seemed to me, in all the different ways I could turn the consideration of it, that there was no way to be taken but to consider it as an accretion to the capital; and the tenants for life will have the benefit of the dividends.

The *Attorney-General* compared it to the case of an unopened mine; observing, that the Court would direct that to go in the manner the estate was settled, and would not suffer

BRANDER r. BRANDER.

the tenant for life to run away with that property, though an accidental profit; and he suggested that the proper way would be to make some provision by law, that the stock should be sold, and made Bank Stock.

The *Solicitor-General** said, the bank might have kept this as a corporation; and might have received the dividends upon it.

Mr. Richards said, the question had been before the Master of the Rolls in a cause heard by consent upon Lord Calthorpe's will: and the MASTER OF THE ROLLS considered it as an accretion to the capital.

[802]

Mr. Piggott (counsel to the bank) said, the bank directors consider it so; that the necessity of its not being previously known, that any thing of this kind was to be done, prevented the bank from consulting any one upon it: but he had given a general opinion, that it was to be transferred to the proprietor, and he would be possessed of it just upon the same trusts, and for the same interests, as he had in the Bank Stock. It has the same effect, as if the dividend was increased. It is not divided as annual profit; as their charter directs: but it has become capital. It might as well be contended, that the tenant for life has a right to have buildings sold, and to have the profit.

LORD CHANCELLOR:

The same thing in effect has been done, when the bank has increased the dividend; the ground of which has been, that there has been a gradual saving; of which they give the benefit to the proprietor, not by payment of a sum of money, but by additional dividend. It would be a neater way to convert it into Bank Stock. They could not do that without an Act of Parliament. Making an increase of dividend they do not displace any one interest in that stock. The proper order is, that the dividends upon the 1,000*l.* Bank 5 per cent. Annuities of 1797 be paid from time to time to the petitioner; who is entitled for life.

The order was drawn up accordingly.

* Sir William Grant.

KENNELL *v.* ABBOTT.†

(4 Vesey, 802—811.)

1797.
June 1.

1799.
July 22.

Rolls Court.
ARDEN, M.R.

[802]

If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the Civil Law is adopted, and the legacy fails. Therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who at the time of the marriage ceremony with her had a wife living, the Court in respect of his conduct held him not entitled; but inclined to think it would be otherwise, where from circumstances not moving from the legatee himself the description is inapplicable; as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect.

By the Civil Law a false reason given for a legacy is not of itself sufficient to destroy it, unless the gift was induced by fraud.

JAMES HICKMAN by his will, dated the 18th of April, 1782, gave to his wife Catherine 300*l.* 4 per cent. Consolidated Bank Annuities; and appointed her sole executrix. Upon his death she possessed herself of his personal estate; paid his debts, &c.; *and exhibited the probate to the bank; but not applying to be [*803] at liberty to transfer the stock into her own name, it continued to stand in the name of the testator.

In 1783 a marriage ceremony was performed between Catherine Hickman and Edward Lovell: but that marriage was void; Lovell having been married in 1775; and his wife being living. He cohabited with his wife till 1781. By articles executed previously to the marriage ceremony with Catherine Hickman, dated the 3rd of January, 1783, she agreed to transfer the said stock upon the trusts therein mentioned, with power to her to dispose of it after the decease of the survivor of herself and Lovell. She never discovered the invalidity of her marriage; and being seised to her and her heirs of a copyhold estate, which she had surrendered to the use of her will, and being possessed of a leasehold estate for a long term of years determinable upon lives, and of personal estate, she made her will, duly attested according to the Statute of Frauds, describing herself

† *Wilkinson* v. *Joughin* (1866) L. R. 2 Eq. 319, 35 L. J. Ch. 684; *Re Boddington* (1883) 22 Ch. D. 597, 52 L. J. Ch. 239.

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the wife of Edward Lovell; and by virtue of the power and authority given her before her marriage with her present husband Edward Lovell, she publishes and declares her last will and testament; giving the said 300*l.* stock to her brother Thomas Abbott, in trust to pay the interest to her niece Betty Kennell for life; and after her decease the principal to be equally divided between her two daughters share and share alike. She gave some leasehold premises to her nephew Martin Togood, his executors and administrators. She gave a copyhold estate, which she had surrendered to the use of her will, to her brother Thomas Abbott and his heirs, in trust to sell, and out of the monies arising therefrom to pay the following legacies: "to my husband the said Edward Lovell the sum of 150*l.*;" to her brother Thomas Abbott 20*l.* to her nephew James Fabian, her niece Elizabeth Cox, and her nephew George Togood, 10*l.* each; and she directed these legacies to be paid within twelve months after her decease. She gave another leasehold estate to her great niece Catherine Kennell, her executors, &c. and she gave all her household goods, plate, furniture, and stock in husbandry, to her brother Thomas Abbott, his executors and administrators, in trust to sell, and out of the produce to put in the life of her said great niece into the said leasehold premises, if she (the testatrix) should not do it in her life. She gave her wearing apparel and linen to her niece Betty Kennell; and as to the residue of the purchase money arising from the sale of *her said copyhold estate, household goods, and furniture, and all the rest, residue, and remainder, of her monies, securities for money, personal estate and effects, whatsoever, and wheresoever, that she should die possessed of, interested in, or entitled to, or whereby she had power to dispose by will, she gave to her said niece Betty Kennell, her executors and administrators, subject to her debts and funeral expenses; and she appointed Thomas Abbott guardian of the children of Betty Kennell, and appointed Betty Kennell executrix.

[*804]

The testatrix died; leaving Edward Lovell surviving her, and John Abbott, her eldest brother, her heir at law. Betty Kennell proved her will: but the probate was limited to the 300*l.* stock, and 100*l.* stock supposed to be standing in the name of,

and purchased by, the trustees, under the articles of the 3rd of January, 1783. Edward Lovell died; leaving an infant son by his lawful wife Ann Lovell; with whom he lived till 1781. She died in 1788.

The bill was filed by legatees under the will of Catherine Hickman; praying, that the trusts of her will may be established, except so far as relates to the bequest to Edward Lovell and the lapsed legacy to James Fabian, who died in the life of the testatrix, and to the guardianship of the infant plaintiffs; and that the pretended marriage articles may be declared void.

The question arose upon the legacy of 150*l.* given to Edward Lovell: which was claimed on the part of his infant son. Supposing that legacy void, it was claimed by the residuary legatee and by the heir.

Mr. Woddeson, for the plaintiffs:

This legacy is clearly void. The books of the common law are barren upon such questions. Swinburne has collected the authorities from the civil law. In the Digest † this rule is laid down; "Falsam causam legato non obesse verius est; quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit si probetur alias legaturus non fuisse." The Code ‡ says, "Fidei commissum ejus qui reliquerat pœnitentiâ probatâ successores nunquam præstare compelluntur." The word "probatâ" is rendered "probable;" which is the true *sense: not "demonstrated." Swinburne § states, that the legacy fails, though the testator were ignorant of the injury done to him by the legatory, when it is such, for which it is very likely the testator would have revoked the legacy. [*805]

The testatrix gives this legacy to a person, who, she supposes, answers the description of her husband; and she intends it for him in that character only.

Supposing this legacy void, it belongs to the residuary legatee of this specific fund; who is likewise the general residuary legatee. * * *

† Book xxxv. tit. 1, l. 72, s. 6.
‡ Book vi. tit. 42, l. 27.
§ Page 557.

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[*Mr. Stanley*, for the heir, concurred with the plaintiffs, that the legacy was void, and claimed the same on the ground that it was in the nature of undisposed of real estate.]

Mr. Cox, for the defendant Lovell:

[806] No question is made of the identity of the person. The description is sufficient to leave no room to doubt, who was intended; and then the general rule ought to take place, that if the person is sufficiently described, whether the description is right or wrong, he shall prevail. The civil law is not to be attended to upon this subject. This is a disposition of part of the real estate. It is treated as real estate throughout. Upon a question arising upon real property the civil law can have no weight. The whole civil law, as a general body, is not adapted to our law even as to legacies. The presumption, the Court is desired to adopt, is a presumption of the civil law; that if the legatee does not answer the description the testator has added to the name, it shall be presumed, that if the testator had known, he did not answer that description, the legacy would not have been given. It is very doubtful, whether that is a fair presumption. A legatee has been often described by a wrong description; as, where a natural child is called a child. Suppose, a testator by mistake called a person first cousin, who was second cousin: describing him otherwise, so that there could be no doubt, who was meant. This is a presumption, that a court of justice will hardly introduce for the first time. But supposing it clear, that the testatrix did not know the fact of Lovell's marriage; will the

[*807] Court suppose, there might not be this degree of affection *prevailing between persons, who had lived in this way; as if they were really husband and wife? The plaintiffs must rely upon its being a fraud by Lovell; and that rests entirely upon the civil law. He might have had some false intelligence of the death of his wife.

Mr. Wooddeson, in reply:

The fraud is manifest from the dates. He married in 1775, and lived with his wife till 1781; which carries it very near the time of the supposed marriage with the testatrix. What the civil

law says is carried farther by Swinburne; who is a general writer upon the testamentary law of this country; and is an authority. He does not put it upon the want of *designatio personæ*, but upon the ground of fraud. * * *

The MASTER OF THE ROLLS during the argument mentioned the case of *The Duchess of Kingston*; who held an estate under a devise by the duke to her, as his loving wife.

MASTER OF THE ROLLS:

1799. *July 22.*

This case has stood a long time; and I believe, the reason I have not been desired to give my judgment, is, that it has abated; and perhaps it may be unnecessary to give it. But as upon very full consideration I have made up my mind, it may be of use, that the parties may know my opinion, in case they think fit to revive it.

The cause arises upon the will of Catherine Hickman; who supposed herself to be married to Edward Lovell; with whom she *had celebrated a marriage. It now appears, that he was a [*803] married man at that time: therefore she is in fact a single woman; and it was a gross fraud as to her. She made her will in execution of the power given to her by the articles executed previously to the supposed marriage; and not aware, that she was a single woman. Upon that will the questions arise. The first question is, whether this legacy of 150*l.* charged upon the produce of the sale of the copyhold estate devised in trust to be sold is or is not a legacy, which this man can claim under the circumstances, that it is given to him as the husband of the testatrix; though he does not possess that character. I thought it a case rather novel in its circumstances, and that scarcely has afforded any decision in the law of England; though there are some *dicta* in the civil law, that seem to bear upon the point. The passage cited from the Code, I think, does not much apply. The passage in the Digest is "Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse."

The meaning is, that a false reason given for the legacy is not

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of itself sufficient to destroy it: but there must be an exception of any fraud practised; from which it may be presumed, the person giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority seems to be the principle of the civil law.

The question is, whether according to the law of England that can apply to a case like the present; and whether the law will permit a man, who obtains a legacy in such a manner, to have the benefit of it. I have not been able to find anything that bears any very decisive analogy to this: but upon general principles I am of opinion, it would be a violation of every rule, that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person, whom he so grossly abused; and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine, that, where from circumstances not moving from the legatee himself the description is inapplicable, as where a person is supposed to be a child of the testator, and
[*809] from *motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out, that he was imposed upon, and the child was not his own, I am not disposed by any means to determine, that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it; and which might entitle him; though he might not fill that character, in which the legacy is given. My decision therefore totally avoids such a point. Neither would I have it understood, that if a testator in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine, whether the law of England will permit this legacy to be claimed by him.

Under these circumstances I am warranted to make a precedent; and to determine, that, wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy.

A case † something like this occurred lately; which took up so much time before the Lords commissioners upon an application for a writ *de ventre inspiciendo* against a woman, who had lived with Mr. Fellowes, and had made him believe, she had been brought to bed of several children; which he was weak enough to suppose his. It was not a question whether they were his children; for if so, I do not apprehend, the decree would have been such as it was. But there were no such children. She had shewn him children as her's, which were not her's; and he gave legacies to them, as her children by him. It was held, that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children; but he was deceived as to the other ingredient of the character, in which he gave them the legacies; for they were not the children of that woman. Therefore upon the principle I have mentioned from *the Digest, and that ought to govern Courts of Justice, I am of opinion, this legacy could not be claimed. * * * [*810]

Declare, that Edward Lovell, to whom the legacy of 150*l.* is given as the husband of the testatrix, was not entitled; and that legacy fell into the residue of her estate, given by her will to Betty Kennell. [811]

† *Ex parte Wallop*, 4 Bro. C. C. 90.

1799.
July 23.

LOUGHBOROUGH, L.C.

[816]

TAIT *v.* LORD NORTHWICK.

(4 Vesey, 816—824.)

The personal estate is the natural fund for the debts; and can only be exempted by the intention to exempt it expressed in the will: a charge upon real estate, however anxious, is not of itself sufficient.

By indentures of lease and release, dated the 16th and 17th of October, 1787, several real estates in the county of Denbigh, of which Richard Myddleton, Esq. was seised in fee, and other estates in the same county, which were in settlement, were conveyed to trustees upon various trusts for the payment of debts; and, subject thereto, to the use of Mr. Myddleton for life; remainder to trustees to preserve contingent remainders; remainder, subject to a term for securing a jointure to Mrs. Myddleton and portions to children by her, to the joint appointment of Mr. Myddleton and his son; and in default thereof to the appointment of the son, if he should survive; and in default of such appointment to the son in tail male; with remainders over to other sons of Mr. Myddleton, the father in tail male; to Richard Myddleton, the son, in tail; to the daughters of the father, as tenants in common in tail, with cross remainders: and to Richard Myddleton, the son, in fee.

Mr. Myddleton the younger, having survived his father, and no joint appointment having been executed, by his will, dated the 20th of June, 1795, duly executed for passing real estate, reciting his power of appointment; and that he had at various times borrowed and taken up of different persons divers sums of money upon his bond and otherwise; and that he also stood indebted unto various persons in divers sums of money by simple contract; and that he had since the execution of the conveyance
[*817] of October, 1787, *purchased certain estates in the county of Denbigh, and had borrowed or taken up money upon mortgage or otherwise for the payment of the purchase-money; and farther reciting, that he was desirous of making a provision as well for the payment and discharge of the money borrowed and taken up for the purchase of the said several estates and all interest and arrears of interest thereof as also for the payment of all such other debts and sums of money, as he should owe at

the time of his death to any person whomsoever, not then already provided for by the indentures before mentioned, and also to settle and assure the said several estates purchased by him to the same uses as the estates comprised in the conveyance of October, 1787, he devised all the manors, messuages, lands, &c., which he had purchased or agreed to purchase, to the use of Lord Kenyon, Lord Northwick, Sir William Pulteney, Bart., and William Lloyd, Esq., upon such and the like trusts, and to and for the same ends, intents, and purposes, and subject to the like powers, provisoes and conditions; in all respects, as the estates comprised in the said conveyance did thereby or by his will and the directions, declarations, limitations, and appointments, hereinafter contained, should stand limited or appointed; and in pursuance of his power under the said indentures he appointed, that the estates thereby conveyed to the said trustees or such parts thereof as should not be sold under the said indentures, and the equity of redemption, reversion or inheritance, of such part or parts thereof as should then be, or should hereafter be, mortgaged, with their appurtenances, subject to the trusts created by the said indentures for raising and the payment of the debts, incumbrances, and sums of money, provided for and directed to be raised by such indentures, should, together with the said hereditaments and premises by the testator purchased, and by his will devised, as aforesaid, remain and continue to the use of, and be vested in, the said trustees, their heirs and assigns, upon the trusts hereinafter mentioned: viz. upon trust by absolute sale or mortgage thereof or of any part thereof, as to them, the said trustees, should seem requisite and proper, or by sale of timber thereon, or by such other ways and means as to them should seem requisite and proper, to raise such sum or sums of money as should be requisite to pay and discharge the said several sums of money borrowed or taken up at interest, or advanced by Sir William Pulteney, as therein mentioned, and all such other debts and sums of money as the testator *should at [*818] the time of his death owe to any person or persons whomsoever by mortgage, bond or other specialty, or by simple contract, or otherwise howsoever, and all interest thereof; and upon farther trust from time to time out of the rents of the same estates to

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pay the interest of such sums of money as should be borrowed, and to retain in their hands so much of the clear residue of the rents and profits, as to them should seem meet, in the nature of a fund to be applied in and towards reducing the principal of the said several debts or sums of money; and he declared it to be his will, and appointed, that, after payment, as well of the said several debts thereby directed to be paid, as of all such sums of money as should be so borrowed and the interest thereof respectively, and all costs attending the execution of the trusts thereby created, the trustees should convey all the said estates as well those purchased by the testator as those comprised in the said indentures of October, 1787, or such parts thereof respectively as should not have been sold or disposed of, and the equity of redemption of such parts thereof as should have been mortgaged, to the uses and upon the trusts by the said indentures declared and limited of and concerning the estates comprised therein, after payment and discharge of the sums of money, debts, and incumbrances, thereby directed to be raised and paid thereout, or such of them as should be then existing and capable of taking effect. The testator then after giving to each of his trustees a legacy of 100*l.* gave all the rest, residue and remainder, of his personal estate whatsoever and wheresoever, and of whatsoever nature and kind to his two sisters Charlotte Myddleton and Maria Myddleton, equally to be divided between them, for their own use absolutely, and he appointed Lord Northwick and Sir William Pulteney executors of his will.

The testator died in December, 1796. Maria Myddleton, who married Frederick West, and Charlotte Myddleton, the testator's sisters of the whole blood, and Harriet Myddleton, his sister of the half blood, by the second marriage, survived him, and were his next of kin according to the Statute of Distributions.

The bill was filed by a creditor by simple contract, an upholsterer, claiming a debt of 1,777*l.* 10*s.* 11*d.* The decree [*819] *pronounced upon the 4th of August, 1795, directed an account of the debts and funeral expenses of the testator; and that the Master should compute interest upon such of the debts as carried interest. An account of the testator's personal estate was also directed; and it was ordered, that the personal estate should be

applied in payment of what was due to the plaintiff and all other the creditors of the testator, and of his funeral expenses, &c., in a course of administration: and that the residue should be paid into the Bank, &c.

An exception was taken to the Master's report by the plaintiff for not allowing interest upon his debt.

The cause coming on at the same time for farther directions, another question arose: whether under the testator's will his personal estate was exempted from the payment of his debts.

Mr. Richards and *Mr. Stanley*, for the plaintiff contended, in support of the exception, that the provision for payment of interest must apply generally to all the debts the testator might owe, observing, that as to debts, which in their nature carry interest, it was unnecessary.

The counsel for the defendant in support of the report were stopped by the Court.

The *Solicitor-General*, *Mr. Graham*, and *Mr. Alexander*, for the defendants, Mr. and Mrs. West, and Charlotte Myddleton:

With respect to the question as to the exoneration of the personal estate; there are a great many cases upon that point. Thus much has been determined; that it is not neccessary to find in the will precise and special words of exemption; but it is sufficient if the intention can be collected from the whole to give the personal estate exempt from the debts. In this will there is an anxious creation of a fund, to arise from the real estate, for payment of all debts; and the personal estate is to be divided between these two sisters. * * * [They cited *Burton* v. *Knowlton*, 3 R. R. 62.]

The LORD CHANCELLOR observed, that the trustees have no power to throw the funeral expenses and the probate upon the real estate; and asked, whether the personal estate could be charged with those expenses and not be charged with the debts. [821]

The *Attorney-General*, for the defendant Harriet Myddleton, the testator's sister of the half-blood:

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The rule is clear, and not to be controverted; that wherever the personal estate is exempt from the debts, it must be taken as a specific legacy: if not, it cannot without express words be exempt. * * *

[823] *Mr. Piggott*, on the same side, was stopped by the Court.

LORD CHANCELLOR:

As to the point upon the exception, I do not see, how it goes out of the common course. These words do not go to raise a charge of interest beyond what the nature of the debt would carry. Upon such a debt too the claim of interest is singular. From what period is it to commence?

With respect to the other point, I did not think, there had been any case so near the argument contended for by the two sisters as *Burton* v. *Knowlton*.† But I confess, I had held a firm opinion, that the doctrine is exactly, as it was laid down in *The Duke of Ancaster* v. *Mayer*.‡ I take the rule at present to be, that the personal estate is the natural fund; that against the charges naturally thrown upon the personal estate you may shew a distinct exemption: or from the whole will you may

[*824] collect, that there is an *intention expressed in the will (I do not mean *in totidem verbis*) that the personal estate shall be exempt. Then charging the real estate ever so anxiously for payment of debts will not of itself be sufficient to exempt the personal estate. I set the whole doctrine afloat, if the argument for the two sisters upon this will is allowed to prevail; for it only comes to this. There are two circumstances; one, that there is a gift of residue of the personal estate: another, that there is a very anxious charge of debts upon the real estate. Beyond that I have no ground to stand upon. All the rest of the circumstances are merely conjectural, upon a supposed intention; and it is asked, what could the testator mean by giving these sisters his personal estate, if they get nothing by it. All I say to that is, that a man giving the residue of his personal estate does not in general mean much. It is, as it may happen.

The decree was made accordingly; and

The exception was overruled.

† 3 R. R. 62.

‡ 1 Bro. C. C. 454.

K. B. MICHAELMAS TERM.

DOE ON THE DEMISE OF BOWERMAN *v.* SYBOURN.

1796. *Nov.* 10.

(7 T. R. 2—3.)

[2]

The jury may presume an old satisfied term surrendered to the *cestui que use*, in order to substantiate a lease executed by him. A bill in Chancery is no evidence of the facts contained therein, not even of those on which the prayer of relief is founded.*

THE premises for which this ejectment was brought had been mortgaged in 1760, by Nicholas Stoddard to George Pym, for a term of one hundred years, subject to a proviso of redemption, on payment of the principal sum of 400*l.* and interest thereon, within six months. Stoddard died in 1765; and the year following, the mortgage money not having been paid, the mortgagee got into possession, and in 1770 assigned the remainder of the term to W. Holt, in trust for him George Pym; and in the same year, by indentures of lease and release, and feoffment, conveyed the premises to H. Holt, and his heirs to the use of him G. Pym in fee, and afterwards levied a fine of the same to the use of himself in fee. The lessor of the plaintiff, who is the heir at law of the mortgagor, in 1778 filed a bill in Chancery against G. Pym, for an account, and in order to redeem; to which the latter appeared, but died before any answer was put in, having by his will devised the premises as freehold in trust to W. Roman, H. Holt and F. Hilton, to the use of his natural son John Pym, and to convey the same to the said J. Pym in fee, on his attaining his age of twenty-one years. The suit in Chancery was revived

* So far as relates to satisfied terms, this class of cases is obsolete by 8 & 9 Vict. c. 112. But the principle of Lord KENYON's judgment is still recognised as authoritative. See *McQueen* v. *Meade* (1873) 28 L. T. 768.—R. C.

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in 1790 against the legal representatives of G. Pym, and a decree of redemption was obtained in 1794, in favour of Bowerman; and amongst other things the Court directed the defendant Sybourn, who was the tenant in possession, to attorn to Bowerman, which he accordingly did.

At the trial of this ejectment before Lord KENYON, Ch. J. at the last assizes for Kent, the defendant set up a lease from J. Pym, dated 16th October, 1789, executed after he came of age, whereby he demised the premises to the defendant for eighty-one years, to commence from 16th February, 1791, when his former lease expired. Against this it was objected on the part of the lessor of the plaintiff, that it did not appear that J. Pym had the legal estate in him at the time, but that it was then outstanding in his trustee, without whose concurrence no legal title could be conveyed: and his counsel offered in evidence a bill in Chancery, filed in 1790 by the present defendant in conjunction with
[*3]. *J. Pym against Bowerman and H. Holt, the surviving devisee in G. Pym's will, stating among other things a lease to Sybourn of the premises from W. Holt and G. Pym for twenty-one years from the 16th February, 1770, which bill prayed a conveyance of the legal estate to John Pym, and that H. Holt might be restrained from compelling Sybourn to pay his rent to him: this bill was afterwards dismissed at the time of the decree for redemption. But Lord KENYON, Ch. J. rejected this evidence at the trial, upon the ground that a bill in Chancery was not evidence of any fact therein contained, but was to be taken merely as the suggestion of counsel; and he thought that the jury might presume a legal conveyance from the trustees to J. Pym upon his coming of age, pursuant to the terms of the trust: upon which the plaintiff submitted to a nonsuit.

Shepherd, Serjt. now urged, upon a motion to set aside the nonsuit, that there was a distinction in this respect between facts stated by way of inducement in a bill of equity, and such matter whereon the plaintiff founds his prayer for relief, as in the present case. And he cited Bull, Ni. Pri. 236, where such a distinction is taken. But by

LORD KENYON, Ch. J.:

A bill in chancery is never admitted in evidence further than to shew that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions of the witnesses. And as to the presumption which he had directed the jury to make, he said he had grounded himself upon the doctrine laid down by Lord MANSFIELD in *Lade* v. *Holford*;* which was not, as had been supposed, that an ejectment might be maintained upon a mere equitable title, which would remove ancient land-marks in the law, and create great confusion; but that in all cases where trustees ought to convey to the beneficial owner he would leave it to the jury to presume, where such a presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form. And this had not only been so held by Lord MANSFIELD, but before his time by Mr. Justice GUNDRY, at Hereford. And he thought this rule, as far as it went, highly convenient and proper.

Per CURIAM: *Rule refused.*

THE KING *v.* BURKS.

(7 T. R. 4—5.)

1796. *Nov.* 10.

[4]

An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false.

THE defendant having been convicted on an information filed against him by his Majesty's Attorney-General for a libel,

Vaughan, F. moved on a former day in this term to arrest the judgment, for two objections appearing on the information; 1st, That the information does not charge the offence to have been committed *vi et armis*; 2ndly, That the libellous matter is not said to be "false." 1st, That the addition of the former words was necessary at common law, appears by the statute 37 Hen. VIII. c. 8, which was passed to prevent advantage being taken of the defect arising from the omission of those words in indictments

* Bull. Ni. Pri. 110; and see per Lord KENYON in *Doe* v. *Staple*, 1 R. R. 598.

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and inquisitions: but that statute does not extend to informations, 2 Hale P. C. 187. Secondly, The word "false" is to be found in most of the *precedents of indictments or informations for a libel, particularly in the more ancient ones.

[*5]

The COURT were strongly inclined to overrule both these objections, but granted a rule to shew cause, in order that the precedents might be examined: but on this day they said that upon examination, they were perfectly satisfied that there was no weight in either of the objections, and therefore they thought it unnecessary to have the rule drawn up, unless the defendant's counsel on further consideration should desire to argue the points.

As to the first objection; they said that the passage cited from 2 Hale, was correct, namely, that the statute 37 H. VIII. did not extend to informations: but that an indictment for a libel before that statute, would have been good without the words *vi et armis;* for that a libel was not in itself an actual breach of the peace, but only tended to a breach of it. * * *

And that, as to the other objection, the greater number of precedents in late times was without the epithet "false;" and that the reason of the thing also was against the insertion of the word "false," because it is not necessary to prove the libel to be false.

The COURT therefore desired that the rule might not be drawn up; and on a subsequent day in the term, the defendant was sentenced to imprisonment.

Abbott, who was counsel for the prosecution, referred to *R.* v. *Sterling* and others, 1 Lev. 125, 6, where an objection to an information for a conspiracy, made in arrest of judgment for the omission of the words *vi et armis*, was overruled.

HUTSON *v.* HUTSON.

(7 T. R. 7—9.)

1796.
Nov. 11.

[7]

To satisfy the rule requiring the presence of an attorney on behalf of a prisoner (person*) executing a warrant of attorney to confess a judgment, the presence of the plaintiff's attorney is insufficient; though the defendant consent to his acting as his attorney also.

THIS was a rule to shew cause why the judgment and execution should not be set aside, on the affidavit stating that the warrant of attorney on which the judgment was entered up, was executed by the defendant while in custody at the plaintiff's suit, no attorney on his part being present at the time.

Garrow, who now shewed cause, after producing an affidavit, [8] by which it appeared that the plaintiff's attorney recommended the defendant to send for an attorney with whom he might consult previous to the execution of the warrant of attorney, but that he declined it, saying it was unnecessary as he perfectly knew the nature of the transaction, and was satisfied with the presence of the plaintiff's attorney; relied on the case of *Gillman* v. *Hill*, † where it was held that a defendant under such circumstances was not entitled to the benefit of the rule of the Court which requires the presence of an attorney for the defendant; and where Lord MANSFIELD said, the Court would not suffer a defendant to convert that which was meant for his protection into an instrument of fraud and deceit. And he added, that it appeared in this case that the defendant had adopted the plaintiff's attorney as his own.

Bayley, in support of the rule:

There are two rules of the Court: one in E. 15 Car. II. which merely required the presence of an atttorney at the time of the execution of the warrant of attorney; the other in E. 4 Geo. II. which recites the former rule, and then orders that no such warrant of attorney shall be valid, unless there be present "some

* See now the statutory requirement of the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 24) which is more extensive than the old rules of Court. And see *Morley* v. *Davis* (1841) 5 Jur. 246.—R. C.

† Cowp. 141.

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attorney on the behalf of such person in custody to be expressly named by him and attending at his request." The object of the rules was not merely to procure the attendance of an attorney to explain the nature of the instrument to be executed, but also to advise the defendant confidentially and as a friend. And rules thus framed for the protection of a prisoner cannot be waived by him when in a situation where he is incapable of exercising his judgment. Besides which, it will be dangerous to admit the answer given in the present case, since as the plaintiff's attorney has an opportunity of swearing last, the same answer may be given to every application, and thus the object of the rules may be defeated in every instance. Nor can the case cited from Cowper be considered as any authority for the present, because there the defendant himself admitted that he executed the bond and warrant of attorney without the presence of any attorney on his behalf, for the express purpose of having them set aside under the rule of the Court.

LORD KENYON, Ch. J.:

I think it would have been more wise in deciding cases on the rule of Geo. II. to have adhered to the letter of it than to have
[*9] gone into the circumstances of each *particular case, especially as that rule was made to explain a former rule in the reign of Charles II.; since an explanatory rule, like an explanatory statute, should never be extended by construction. There is great weight in the observation made by the counsel in support of the rule, that the defendant under the pressure of an arrest ought to be considered incapable of waiving the benefit of this rule, and that at all events, and in all cases, he should be protected by the advice of an attorney expressly attending for him. If the only object of the rules had been to guard the defendant in those cases where fraud is actually practised, there would have been no occasion for any rule at all, because the Court would have set aside a warrant of attorney obtained by fraud, without the assistance of those rules. But those rules were framed in order to exclude, if possible, all questions respecting fraud. Were it not for any decision on this subject, I should not have had the least particle of doubt but that the judgment and

execution in this case ought to be set aside. But as the plaintiff may have relied on the case cited from Cowper as a decision in his favour, perhaps it would be too much to make this rule absolute; though whenever the question shall arise in future, I shall protest against any infringement of the strict rule, upon any ground whatever, being satisfied that justice will be best attained by inviolably adhering to it.

HUTSON v. HUTSON.

The COURT then gave the defendant an opportunity of answering the affidavit filed by the plaintiff; and on a subsequent day an affidavit made by the defendant was produced, in which he denied all the matters contained in the plaintiff's affidavit; whereupon

The rule was made absolute.

GORDON *v.* HARPER.†

(7 T. R. 9—14.)

1796. *Nov.* 11.

[9]

Where goods leased as furniture with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease, because to maintain such an action he must have the right of possession as well as the right of property at the time.

IN trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. On the 1st October, 1795, and from thence until the seizing of the goods by the defendant, as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture, to the plaintiff under an *agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not expired. The goods in question were on the 24th of October taken in execution by the defendant, then sheriff of the county of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgment at the suit of J. Broomhead and others, executors of J. Broomhead deceased, against one Borret, to whom the goods in question had belonged, but which goods, previous to

[* 10]

† *Lord* v. *Price* (1874) L. R. 9 Ex. 54, 43 L. J. Ex. 49.—F. P.

GORDON v. HARPER

the agreement between the plaintiff and Mr. Biscoe, had been sold by Borret to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action of trover.

[After argument by *Burrough* on behalf of the plaintiff,]

[11] *Best, contrà,* was stopped by the Court.

LORD KENYON, Ch. J.:

The only point for the consideration of the Court in the case of *Ward* v. *Macauley** was, whether in a case like the present, the landlord could maintain an action of trespass against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that trover was the proper remedy, was an extra-judicial opinion, to which upon further consideration I cannot subscribe. The true question is, whether when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can notwithstanding recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture, which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term: the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply: the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and by the very

* 4 T. R. 489.

act of felling it his right is absolutely determined; and even then the property does not vest in his *immediate landlord; for if he has only an estate for life, it will go over to the owner of the inheritance. Here however the tenant's right of possession during the term cannot be devested by any wrongful act, nor can it thereby be revested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do: but it is clear that he cannot maintain trover.

GORDON v. HARPER. [*12]

ASHHURST, J.:

I have always understood the rule of law to be, that in order to maintain trover the plaintiff must have a right of property in the thing, and a right of possession, and that unless both these rights concur, the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises: but supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution, should not avail himself of the beneficial use of them during the term.

GROSE, J.:

The only question is whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time, nor the right of possession. The common form of pleading in such an action is decisive against him: for he declares that being possessed, &c. he lost the goods; he is therefore bound to shew either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession as against a tort-feasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession; and he would be a trespasser if he took the goods from the tenant: then by what authority can he recover them from any other person during the term? It is laid down in

GORDON v. HARPER.

some of the books† that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent; but certainly it may be said to be a good general criterion. But *it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And if not, it is a strong argument to shew that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward* v. *Macauley*. But the only question there was, whether trespass would lie under these circumstances; and it was not necessary to determine how far trover might be maintained. It appears now very clearly upon examining that point that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

[*13]

LAWRENCE, J.:

The observation which my brother GROSE has made upon the form of the action of trover is very material; the plaintiff therein states that he was possessed of the goods mentioned, and being so possessed he casually lost them, and that they came to the hands and possession of the defendant by finding. And the principal difficulty in mos of the cases reported upon this head has been, whether the plaintiff had such a possession whereon he could declare in this action; as in Latch. 214, where the plaintiff, as executor, declared upon the possession of his testator, and the Court held that to be sufficient, because the property was vested in the executor; and no other person

† Vid. 1 Bac. Abr. 45, and 5 Bac. Abr. 257; 2 Com. Dig. tit. Detinue, letter (D.)

having a right to the possession, the property drew after it the possession in law. In *Berry* v. *Heard*, Palm. 327, and Cro. Car. 242, it was for a long time in great doubt, whether the landlord had such a possession of timber cut down pending a lease on which he could maintain trover; but it was finally determined that he had, because the interest of the lessee in it, remained no longer than while it was growing on the premises, and determined instantly when it was cut down. Now here if the taking of the goods by the sheriff determined the interest of the tenant in them, and revested it in the landlord, I admit that the latter might maintain trover for them upon the authority of the other case: but it is clearly otherwise; for here the tenant's property and interest did not determine by the sheriff's *trespass, and the tenant might maintain trespass against the wrong doer, and recover damages. He is bound to restore the goods to the landlord at the end of his term; and could not justify his not doing so, because a stranger had committed a trespass upon him in taking them away. [*14]

Postea to the defendant.

DAVIS *v.* LEWIS.

(7 T. R. 17—19.)

1796. *Nov.* 15.

[17]

It is no justification to an action of slander, to plead that such an one told the slander to the defendant.†

In this action for slander, the first count of the declaration stated that the defendant, speaking of and concerning the plaintiff in his business as a tailor, said to him, "I heard you were run away," meaning that the plaintiff had left his usual place of habitation, with an intent to defraud his creditors. The words in the second count were, "A person has been here to tell me that you were run away."

The defendant pleaded in justification, that before the speaking of the words, he, the defendant, had heard and been told by one D. Morris, that the plaintiff was run away, for which reason he spoke them.

† *Watkin* v. *Hall* (1863) L. R. 3 Q. B. 396, 37 L. J. Q. B. 125; *Purcell* v. *Sowler* (1877) 2 C. P. Div. 215, 46 L. J. C. P. 308.—F. P.

DAVIS v. LEWIS.

To this there was a general demurrer.

[After argument,]

LORD KENYON, Ch. J:

[19] Whether this be considered on the authorities or on the reason of the case, the justification cannot be supported. The *Earl of Northampton's* case* is precisely in point. If a person say that such a particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken: † but if he assert the slander generally, without adding who told it to him, it is actionable. Then it is said, that it is sufficient to repel such action to disclose by the defendant's plea the person who told him the slander: but that is clearly no justification, after putting the plaintiff to the expense of bringing the action. The plaintiff can only impute the slander to the man who utters it, if the latter do not mention the person from whom he heard it. The justice of the case also falls in with the decisions on this subject. It is just, that when a person repeats any slander against another, he should at the same time declare from whom he heard it, in order that the party injured may sue the author of the slander. I am therefore clearly of opinion, both on authority and the reason of the case, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

1796. *Nov.* 19.

JACKSON *v.* BARNARD.

(7 T. R. 35.)

[35] An attorney plaintiff may sue by common process and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney.

THE plaintiff, an attorney, sued by original, a copy of which he served on the defendant, indorsed "J. Jackson," in person.

* 12 Co. Rep. 233-4.

† This dictum of Lord KENYON as well as the authority of *Lord Northampton's* case upon this alternative of the proposition is dissented from by BAYLEY, J. and PARKE, J. in *McPherson* v. *Daniel* (1829) 10 B. & C. 263; and cannot be relied on as of any authority now.—R. C.

He then declared "by his attorney H. Rosser;" and gave notice of declaration in the name of J. Jackson. Whereupon

JACKSON v. BARNARD.

Wigley, for the defendant, moved to set aside the proceedings for irregularity, on two grounds: 1st. That as the plaintiff had declared by attorney the process should have been indorsed with the name of an attorney. 2ndly. That, if the process were considered, as having been sued out by himself, it was irregular to declare by attorney.

Sed per CURIAM:

There is no foundation for either of the objections. An attorney may, if he please, sue as a common person, and may use his own name as the attorney. And he may also declare by another attorney.

Therefore a rule to shew cause was refused.

DOE ON THE DEMISE OF THE DUKE OF BEDFORD *v.* KIGHTLEY.

1796. *Nov.* 24.

(7 T. R. 63—64.)

[63]

A notice delivered to a tenant at Michaelmas 1795, to quit at Lady-day, "which will be in the year 1795," was held to be a good notice to quit at Lady-day 1796.

ON the trial of this ejectment at the last assizes before Lord Ch. J. Eyre, the defendant, who was a tenant to the lessor of the plaintiff, objected to the notice to quit, which was served just before Michaelmas, 1795, and was to quit "at Lady-day, which will be in the year 1795." The plaintiff's counsel answered: 1st. That this was evidently a mistake in the notice delivered to the tenant, the copy which was kept by the party serving it being in 1796; and that the words "which will be," that preceded the "year 1795," shewed that it was prospective. 2ndly. That there was evidence of a parol notice, the written notice, objected *to having been given to the defendant by an agent to the lessor of the plaintiff after a conversation in which the latter said, that as the former would not agree to the terms proposed for a new lease he was directed to give him notice to quit at the next Lady-day. The plaintiff however was

[*64]

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nonsuited, leave being reserved to enter a verdict for him if this Court should be of opinion that either the written or the parol notice was sufficient.

A motion to set aside the nonsuit having been accordingly made on a former day, it was now opposed by the defendant's counsel. But,

LORD KENYON, Ch. J., said

The time when the notice was given and the words in it "which will be" manifestly shewed that this was a notice to quit at the then next Lady-day; and the conduct of the parties also shewed that they so considered it. Then the year 1795 in the notice may be rejected as an impossible year.

Per CURIAM: *Rule absolute.*

Le Blanc, Serjt. and *Wilson*, for the plaintiff.

Sellon and *Best*, for the defendant.

1796. *Nov.* 24.

[67]

MANTON AND ANOTHER, ASSIGNEES OF LANGWITH, A BANKRUPT, *v.* MOORE.

(7 T. R. 67—73.)

A. having contracted with a canal company to build locks and bridges on the canal as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises on the banks of the canal; and on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny. Afterwards the company took out execution upon a judgment confessed by A.; and the sheriff seized these goods, and A. became a bankrupt. Held that A. had not such a possession of the goods as would enable his assignees to take them within 21 Jac. I. c. 19, s. 11 (the reputed ownership clause), for the best delivery was given that the nature of the goods would admit of,* they being before on the company's premises. And held that this bill of sale was no act of bankruptcy in A.

THE defendant, sheriff of the county of Leicester, having on the 19th of January, 1795, taken in execution, at the suit of the Oakham Canal Company, the goods of the bankrupt, this action

* See, as to delivery of bulky goods, *Chaplin* v. *Rogers*, 1 East, 192 (reported *in loco*, *post*); *Tansley* v. *Turner*, 2 Bing. N. C. 151; *Cooper* v. *Bill*, 3 H. & C. 722.—R. C.

was brought by his assignees in order to try, amongst other things, whether a security given by Langwith to the Oakham Canal Company (a bill of sale dated 24th October, 1794) was in itself an act of bankruptcy: The cause coming on for trial at the Lent assizes, *1796, was referred to the arbitration of a gentleman at the bar; and the Oakham Canal Company were by consent made parties to the rule of court. The arbitrator, being desirous that his opinion on the point of law might be submitted to the revision of this Court in case either of the parties should be dissatisfied with his judgment, stated at length in his award, the facts as they appeared to him upon examination, with the grounds of his judgment thereon. After setting forth the parties to the award and their respective interests, together with the bill of sale [which expressed that the property in and possession of the goods were assigned and transferred by Langwith to the company], and the question arising thereon, as before stated, he stated that the Oakham Canal Company had advanced to Langwith, who was employed by them as an engineer, the sum of 5,216*l.* 0*s.* 9*d.*, and that the work done by him at that time amounted to 1,940*l.* 4*s.* 1*d.* That Langwith had besides expended in articles for the use of the canal, and which were then lying on the banks of it, 1,566*l.* 4*s.* That at this period he applied to the company to advance him 600*l.* more, in order to pay his creditors in Yorkshire and Lincolnshire, the full amount of their debts: Upon which, as he was considerably in arrear to them, they required some security from him for the money which he owed to them; and accordingly a bill of sale of part of his effects was executed and delivered to them by the delivery of one copper halfpenny, on the 24th of October, 1794. But this bill of sale extended only to such parts of his effects as were bought with their money, and were then lying upon the banks of the canal which were their premises. That the company, meaning to continue him as their engineer, took no possession of those effects by seizing them, until the 19th January, 1795, when, dissatisfied with his conduct, they removed him as their engineer, and seized the effects; after which he was declared a bankrupt upon another distinct and subsequent act of bankruptcy.

[*68]

1796.

MANTON and Another v. MOORE.

[69]

[The arbitrator further stated that it appeared to him that the security was given by Langwith to the company on the expectation of a further advance, which was in fact made; and that under the circumstances no false credit was derived by Langwith leaving the goods where they were. He accordingly adjudged that the bill of sale was not an act of bankruptcy.]

[70]

A rule having been obtained to shew cause why the award should not be set aside,

Gibbs, *Balguy*, *Gally*, and *Torkinton*, were now to have shewn cause: * but the Court desired to hear the other side.

Perceval, *Parke*, and *Vaughan*, in support of the rule:

It is clear that Langwith was at one time in possession of this property, and this was notorious to all the world; and it enabled him to gain credit upon it. The property therefore could not be changed by a secret conveyance between the parties unaccompanied with any visible alteration of the possession: but such a deed being itself fraudulent and void with respect to creditors, constitutes an act of bankruptcy. *Twine's* case † went on the ground of defrauding other creditors. There a deed of assignment of goods and chattels was held fraudulent and void, for this, among other reasons, that the donor continued in possession and used them as his own. And yet there was a prior debt and a good consideration as between the parties in that case as well as in the present. The cases of *Stone* v. *Grubham*, ‡ and *Edwards* v. *Harben* § proceeded on the same principle. Now here the possession remained, to all appearance, the same after as before the conveyance, and the bankrupt continued to gain a false credit as the owner of the goods. And the subsequent acts of the parties are decisive to shew that in their own contemplation the possession remained in Langwith, notwithstanding the conveyance from him to the company, for they actually seized these identical goods when they found him upon the eve of bankruptcy,

* Vid. *Collins* v. *Forbes*, 1 R. R. 712.

† 3 Co. Rep. 80.

‡ 2 Bulstr. 226.

§ 1 R. R. 548.

which would have been nugatory if they had considered the bill of sale and delivery of the copper halfpenny a sufficient possession in them before. This therefore serves to explain the prior transaction, and shews that the bankrupt was in the actual possession of the goods after the secret conveyance from him.

LORD KENYON, Ch. J.: [71]

It has been properly admitted that if such a possession of the goods as the nature of the case would permit was taken by the Canal Company at the time when the bill of sale was executed, there is an end of the question. Then it becomes necessary to consider what was the situation of these parties; the Canal Company, who were carrying on great works, had employed an engineer, and had advanced money to him with which he had procured the goods in question, and deposited them on the banks of their canal, fit for the purpose of being there used; these materials were of great bulk; and this engineer, so being in arrear to the company, executed to them a bill of sale of these goods then lying on the banks of their canal which were their property. In cases of this kind, the question whether the act be or be not fraudulent depends on another question, whether the goods be or be not delivered with the instrument that professes to convey them. A conveyance of goods, without deed, is fraudulent, unless possession of the goods be given: if it be by deed, it is fraudulent, and an act of bankruptcy. But in this case no other possession could have been given. When the bill of sale was executed, the goods remained on the premises of the Canal Company, to whom the conveyance was made. It has been admitted in many cases, that there need not be a transmutation from hand to hand; where goods are in a warehouse, the delivery of the key of the warehouse has been held sufficient; and yet such a conveyance may be as secret as the present. It is stated in the award, that Langwith could not derive any false credit from the supposed possession of these goods, because they appeared, from the situation in which they were placed, to belong to the company, on whose ground they were lying. Then, not knowing what other delivery of the goods there could have been, I am bound to say that the possession depended on the property

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of the goods. This appears to have been a fair transaction; the goods were bought with the money of the company, and were intended for their use. This is not like *Twine's* case that has been referred to; that was a case of great fraud. I am therefore of opinion that the honesty of the case falls in with the law of the case, and that the decision of the arbitrator was perfectly right.

ASHHURST, J.:

The only question is, whether possession of the goods were or were not given to the Canal Company when the bill of sale was
[*72] made, and I think it was. The goods were *before lying on the premises of the company, and there could have been no other delivery of the goods; it would have been absurd to have removed the goods from the place where they were lying, since they must have been afterwards brought back to the very same spot in order to be used.

GROSE, J.:

It has been contended that this deed was an act of bankruptcy on the ground that it was fraudulent. But it was not fraudulent as far as respected Langwith's other creditors; it was for their benefit, for the Canal Company, in consideration of the bill of sale, were to advance him more money, in order to enable him to pay his other creditors, and to carry on his business. Nor was the deed fraudulent as far as respected the Canal Company. Then it was said that the transaction was fraudulent because the possession of the goods was not changed, and *Twine's* case was cited to prove it: but the circumstances of that case differ from those in the present; and it must be remembered that in that case the not transferring the possession was only said to be a badge of fraud, and not necessarily fraudulent in itself. Then we must take all the circumstances of the case into consideration, and see whether it be or be not fraudulent: but I am of opinion that the question of fraud was for the consideration of the jury; and the duty of the jury in this case devolved on the arbitrator, who has determined that there was no fraud in the case. I agree with the determination in *Edwards* v. *Harben*, though

even there the case of *Bucknal* v. *Roiston* was mentioned by Mr. J. BULLER, in which it was held that the want of possession did not make the bill of sale fraudulent, it being consistent with the deed. But in this case I think that possession of the goods was delivered to the company, as far as possession under these circumstances could be given; and that there was no fraud in the transaction.

LAWRENCE, J.:

Twine's case, on the authority of which it has been contended that this deed was fraudulent, is very distinguishable from the present. There the debtor, in order to defeat an execution sued out by one of his creditors, executed a bill of sale of some goods to another; and the vendee, though a creditor, suffered him to continue in possession of the goods; he appeared to the world and acted as the owner of the goods, and indeed sold some of them afterwards, though the professed object of the bill of sale was to make an absolute transfer of the goods to the vendee. But it has been said, that in this case the bankrupt must be *considered by the world as the owner of the goods after the [*73] bill of sale, because the goods remained where they were before, and no possession of the goods was delivered to the Canal Company. I agree that if the possession of the goods by the company did not accompany the bill of sale, this would have fallen within those cases where the want of possession was deemed a badge of fraud: but what was the possession of the bankrupt himself before the bill of sale? The goods were then apparently in the possession of the company, because they were lying on their banks; the bankrupt had no possession of the goods otherwise than because he had the property in them: but when he transferred that property to the company, the law referred the possession to the company who had the property, and in whom the sole possession apparently was before; and consequently no false credit in the bankrupt was held out to the world. I am therefore of opinion that this deed was not fraudulent.

Rule discharged.

1796.
Nov. 25.

[73]

PEDLEY *v.* GODDARD.

(7 T. R. 73—79.)

Upon an application for an attachment for non-performance of an award, the submission to which was made a rule of court by virtue of the 9 & 10 W. III. c. 15,† it is competent to the parties to object to the award for any illegality apparent upon the face of it, although the time limited by that statute for applying to the Court to set aside the award is expired. An award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days (which, in fact, was after the time limited for making the award) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a certain other less sum, is illegal and void, being uncertain and inconclusive.

Two rules had been obtained, the one for an attachment against the defendant for not performing an award made the 5th of November, 1795, under arbitration bonds, the submission to which had been made a rule of Court. The other, a cross motion made in last Trinity Term to set aside the attachment, on the ground that the award was bad on the face of it, it not being final. The arbitrators awarded that there was due from the defendant to the plaintiff 147*l.* 3*s.* 3*d.* (in case the sum of 25*l.* 11*s.* thereinafter mentioned, was paid to the defendant,) over and above the dividends thereinafter set forth ; and that the defendant should pay that sum to the plaintiff on or before the 14th of December, 1795. The award then set forth, that doubts had arisen in the minds of the arbitrators whether the sum of 25*l.* 11*s.* for which a bill of exchange, dated in February, 1792, was drawn at the instance of the plaintiff on one A. Carew, payable to the defendant on demand, had ever been paid to the defendant; and also whether any dividends, over and above the sum of 12*l.*, had been received by the defendant for the use of the plaintiff, in

[*74] respect of a certain other *bill of exchange for 49*l.* either drawn, accepted, or indorsed by one Elliot. Then the arbitrators awarded that the defendant should, within twenty-one days from the date of the award, by an affidavit, declare, on oath, what sum had been received by him or for his use by virtue of

† See now Arbitration Act, 1889 (52 & 53 Vict. c. 49). There is no time now expressly limited by the statute for the application (under s. 11 (2)) to set aside an award for misconduct. But this does not affect the principle or lessen the importance of the distinction on which this decision rests.—R. C.

the bill so drawn on A. Carew; and if the whole or any part of the sum of 25*l.* 11*s.* has not been paid, they awarded and authorised the defendant to deduct from the 147*l.* 3*s.* 3*d.* so much of the sum of 25*l* 11*s.* as should appear by the affidavit not to have been received. And further, in case it should within twenty-one days from the date of the award, be made to appear, by an affidavit to be made by any person whomsoever, that any further dividend or sum over and above the sum of 12*l.* had been paid by any person to the defendant, or for his use, in respect of the bill of exchange for 49*l.*, then they awarded that the defendant should, on or before the said 14th December, 1795, pay to the plaintiff such further sum, over and above the said 12*l.* as should be so proved to have been received, &c.

Holroyd shewed cause against the rule for issuing the attachment, and argued in support of the rule for setting aside the award. The application for the attachment is grounded on the 9 & 10 W. III. c. 15, which directs that a submission to arbitration may be made a rule of Court, and that for non-performance of the award, the party shall be subject to all the penalties of contemning a rule of Court, with this proviso, that any arbitration procured by corruption or undue means may be set aside, so as complaint be made to the Court before the last day of the next term after such arbitration made and published. This, it is contended, precludes the defendant from making any objection to the award after that period. But the meaning of the Act was only to confine the party complaining to move within the time limited to set aside an award for any matter dehors the award; because where the objection arises on extrinsic circumstances, evidence of the facts might be lost if not brought forward recently after the occasion, and therefore it was proper that the time should, in that respect, be limited. But there is no danger of leaving the time unlimited where the objection appears on the face of the award; nor was there any reason why the Legislature should in that case put the party to the expense of applying to set it aside. * * *

He then proceeded to shew, 2ndly, that the present award was bad on the face of it, it not being conclusive between the parties, but depending on a future examination and future acts of one of [75]

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them; and because also those acts were not to be done until after the expiration of the time limited by the bonds for the ultimate decision of the arbitrators.†

B. Morice, contrà. * * *

[77]

LORD KENYON, Ch. J.:

With regard to the last point I do not think that the award is final. The case that most resembles this is that cited from 3 Lev. 18: but that is like the common case of leaving costs to be taxed by the officer of the Court, which does not vitiate the award. But here the arbitrators, instead of determining the points in dispute between these parties, have left one sum in dispute to be decided by the person who of all others was the least qualified to decide, the defendant himself.

But the first point is one of the most important questions that has been agitated since I have had a seat in this Court. There appear to be a dicta both ways. In *Freame* v. *Pinegar*‡ Lord MANSFIELD said "that where no objection is made to an award within the time limited by the statute, the other side may apply for an attachment to enforce the performance of the award." Now that is very correct when applied to the case then in judgment: but it was not meant as a general rule; or if it were I think that it was extrajudicial, and we are not bound by it. I am afraid however that I was mislead by this on a former occasion, § when I thought that an attachment for non-performance of an award ought to be granted *ex debito justitiæ*, unless a motion to set aside the award were made within the time limited by the statute. But on looking into the Act of Parliament and the cases that have been cited, I think that that opinion was hastily formed. This is an authority given by the Legislature to the Court to be exercised in a summary way; the Act directs that in

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case of disobedience to *an award made under the statute, the party neglecting or refusing to execute the same shall be subject to all the penalties of contemning a rule of Court, &c., unless

† By the arbitration bonds, the award was to be made on or before the 6th Nov. 1795. It was, in fact, made on the 5th, and the defendant was allowed twenty-one days after to make the affidavit required.

‡ Cowp. 24.

§ When this case came before the Court the first time.

the award be procured by corruption or other undue means; in which case, the second section says the arbitration shall be judged and esteemed void; so as complaint of such corruption or undue practice be made in the Court, &c. before the last day of the next Term after such arbitration made, &c. When a party therefore wishes to set aside an award on account of extrinsic circumstances, it is proper that the application should be made to the Court recently after the award is made, and while the facts are in the memory of the parties concerned: But when the award is bad on the face of it, it carries with it those circumstances which go to its destruction; and in that case it seems reasonable that the objection may be taken to the award at any time whenever the adverse party endeavours to enforce it; and certainly this is the case when the attempt to enforce the award is by action. However this does not depend on reason or the good sense of the thing alone; for it is supported by great authorities. In the case cited from Andr. 297 * the Court said that "an award could not be set aside, unless it be for fraud or corruption in the arbitrators, because to these cases only the statute extends." And LEE, Ch. J. added, "that he remembered this distinction to be made by Mr. J. POWEL, that the Court will not set aside an award for defects appearing on the face of it; but this is a good reason against granting an attachment for refusing to perform it." Some of the other cases that were cited are also to the same purpose. Therefore after the best consideration that I can give the subject, and I have frequently turned it in my mind since the case first came before the Court, I am of opinion that the sound construction of the Act of Parliament is, that if a motion be made to set aside an award for extrinsic matter, it must be made within the time limited by the Act, namely, before the end of the next Term; but that an application for an attachment for not performing an award may be resisted at any time for defects appearing on the face of the award itself.

ASHHURST, J.:

I confess I have always understood the distinction to be that which my Lord has adopted; and I think it has been several

* *Hutchins* v. *Hutchins*.

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times laid down in this Court since I have been here. When either party moves to set aside an award for matter dehors the award, the motion must be made within the time prescribed by the statute; but where the defect is apparent on the award, the objection to it may be taken at any time when the Court are [*79] called *upon to enforce it; for it would ill become the dignity of a court of justice to enforce by attachment, for a contempt of the Court, an instrument which on the face of it appears to be an illegal instrument. This seems to be a sensible distinction, independently of the authorities; but the authorities also seem to establish it.

GROSE, J.:

Two different things are prayed by these rules; one that the award may be set aside: the other that an attachment may be granted. With regard to the first, as this was submission to arbitration under the statute, every thing that is to be done either for the purpose of enforcing or setting aside the award, must be done under the powers given by the statute. Now on looking to the Act, it appears that the Court have no jurisdiction to set aside the award; the words being clear and explicit, that such an application must be made before the end of the Term next after the award was made. But that is no reason why we should grant an attachment for not performing the award if it be bad on the face of it. If the party has a right to enforce the award, he may bring his action, and then the adverse party may take advantage of any objections appearing on the award by pleading or demurring; and either party may carry the record to another tribunal by writ of error. I do not think that this award is final for the reasons already given: but even if it be doubtful whether the award be or be not good, we ought not to grant an attachment. The distinction in *Hutchins* v. *Hutchins* is applicable to both these rules; we will not set aside this award, nor will we grant an attachment for refusing to perform it.

LAWRENCE, J.:

If we grant an attachment, we deprive the party objecting to it of all opportunity of discussing its legality hereafter; the attach-

ment would be conclusive; whereas if we leave the party, who wishes to enforce the award, to bring his action, the legality of the award may be questioned in a superior Court on a writ of error. Since the case was first mentioned, I have looked into the several authorities in order to see whether the legality of an award may be questioned on a rule for an attachment for not performing it; and I think that the case in Andrews decides that it may, for objections appearing on the award itself. In many cases the Court have refused to enquire into the award after the time limited by the Act, where the award appeared to be good on the face of it: but I find no case contrary to that in Andrews, which seems to mark out the true line of distinction.

PEDLEY v. GODDARD.

Per CURIAM:

Both rules discharged.

K. B. HILARY TERM.

1797. *Jan.* 26.

[83]

DOE ON THE DEMISE OF T. MARTIN AND JONES *v.* WATTS.

(7 T. R. 83—86.)

If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainderman. But if the remainderman accept rent, as rent, after the death of the tenant for life, it is evidence by way of admission of a tenancy from year to year.*

THIS was an ejectment to recover some premises in Bermondsey in the county of Surrey. On the trial it appeared that J. Martin deceased, who was tenant for life under a settlement, with remainder in tail to T. Martin one of the lessors of the plaintiff, had a power of leasing the premises in question for twenty-one years in possession, without fine, and at the best rent; and that in 1779, he granted a lease to Stubbs, under whom the defendant claimed, for twenty-one years, at the annual

* The authority of the former proposition is confirmed by *Smith* v. *Widlake* (1877) 3 C. P. D. 10, 15; 47 L. J. Ch. 282. The same case shews that the presumption stated in the latter proposition does not hold in the case of the acceptance of a nominal rent under a supposed building-lease.—R. C.

DOE dem. MARTIN v. WATTS.

rent of 36*l.*; the premises being then worth 60*l.* per ann. That J. Martin received the rent during his life time. That after his death which happened on June 4th, 1794, Lane, who was authorised by T. Martin to receive rent for him, received rent of the defendant for him, and paid part of it to the executors of J. Martin and the rest to T. Martin. It was objected, on the part of the defendant, that admitting the lease in 1779 to be [*84] *void, the receipt of rent from the defendant by T. Martin, created a tenancy from year to year, and that the plaintiff could not recover, not having given the defendant notice to quit. Mr. Baron HOTHAM, who tried the cause, being of that opinion, nonsuited the plaintiff, with liberty for him to move to set aside the nonsuit without costs, if this Court should be of opinion that no notice was necessary.

A rule having been accordingly obtained for that purpose in the last Term,

Garrow and *Marryat* were now to have shewn cause against it. But

Shepherd, Serjt. and *Const*, *contrà*, were desired to begin:

[To shew that the lease was void and not capable of confirmation, they cited, *Jenkins* d. *Yate* v. *Church*, Cowp. 482; *Doe* d. *Simpson* v. *Butcher*, Dougl. 50; and *Ludford* v. *Barber*, 1 R. R. 156. They argued that the remainder-man having accepted the rent under a mistaken notion that it was due under the lease, no other agreement between the parties could be implied; and cited a *nisi prius* case in support of this argument.]

[85] LORD KENYON, Ch. J.:

I admit all the cases that have been cited, except the last at *nisi prius*: they only prove, what indeed is admitted by the counsel for the plaintiff in this case, that a lease made by a tenant for life, which is void in its creation, cannot be confirmed by the reversioner: but they do not shew that when such a lease is abandoned another relation may not subsist between landlord and tenant, by the one paying and the other receiving rent. Here one of the lessors of the plaintiff received rent by his

steward *eo nomine* as rent: if the defendant had been a trespasser, no rent could have become due; it could only be paid as rent under the idea that the defendant was a tenant; and if he were a tenant the plaintiff cannot recover, not having given him notice to quit. It would be extremely unjust that a tenant who occupies the land should, after he has sown it, be turned out of possession by an ejectment, without any notice. And it was in order to avoid so unjust a measure that so long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice to quit.† That rule has always prevailed since; and in times certainly as enlightened as those, we ought not to depart from a rule which was so wisely and justly settled. Therefore I am clearly of opinion, on the authority of all the cases that have been decided, (except that at *nisi prius*, which perhaps passed without much consideration, and cannot be put in the balance against all the other decisions,) and on the justice and convenience of the case, that this rule must be discharged.

ASHHURST, J.:

It is clear that the lease which was void could not be confirmed by the reversioner. It is also clear that the reversioner received rent, as rent, after his title accrued; and by accepting the rent he acknowledged the defendant to be his tenant from year to year.

GROSE, J.:

The question is, whether there was or was not any evidence of a tenancy between one of the lessors of the plaintiff and the defendant. It being admitted that the lease was void, the defendant was not tenant under that lease. But the plaintiff *received rent of the defendant; and from that moment he [*86] admitted that the defendant was a tenant to him of some kind; and no other tenancy appearing here, the defendant must be considered as tenant from year to year. The consequence of a contrary decision would be that, though the defendant had continued to occupy this estate for twenty years, without any

† Vid. 13 Hen. VIII. 15, b.

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other lease, the plaintiff might equally have denied that the defendant was his tenant.

LAWRENCE, J.:

If the defendant were not a tenant, he must have been a trespasser, and so he must have continued if he had remained on the premises for any number of years: but the plaintiff has, by his own act, admitted the defendant to be his tenant, and cannot therefore now consider him as a trespasser. It has been said however that the plaintiff was ignorant of his title when he received this rent: but he was bound to know his own title; and he cannot be permitted to avail himself of his ignorance to the prejudice of the defendant, and to say that, because he did not examine his own title, he may consider the defendant as a trespasser, and turn him out of possession without notice. And if this is to be determined on the reason of the thing, it is much more reasonable that the plaintiff, who ought to have looked into his title, should be bound by his own act, than that the defendant should be turned out of possession without any notice, merely on account of the supposed ignorance of the plaintiff.

Rule discharged.

1797. *Jan.* 28.

THE KING *v.* THE JUSTICES OF SUSSEX.

(7 T. R. 107—109.)

[107]

Where the Quarter Sessions are held at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original sessions but before the adjourned sessions, an appeal at the next ensuing adjourned sessions is in time, and ought to be received.*

A RULE was obtained in the last Term calling on the defendants to shew cause why a mandamus should not issue, directing them to receive and hear an appeal against an order of two justices for the removal of T. Laycock, his wife and children. It appeared that in point of fact there are two divisions, though

* Followed in a case of appeal against a poor-rate. *R.* v. *Justices of Lancashire* (1876) 34 L. T. 124.—R. C.

not legally recognized, in the county of Sussex, the Eastern and Western, though there is but one commission of the peace for the whole county; and the Quarter Sessions are always held first in the Western, and afterwards adjourned into the Eastern, division. The sessions commence in the Western division on the Tuesday. The removal in question was made on the Wednesday being the 13th July, 1796, to the parish of Peasmarsh, which is situated in the Eastern division; the adjournment day into which was on the Friday following. The appeal was not lodged at that sessions, but was preferred at the next October sessions held by adjournment in the same Eastern division. An objection was there made that it came too late, and the sessions, after hearing evidence *of the facts, and taking into consideration the distance of the appellant parish, were of opinion that the adjournment sessions in July were the next possible sessions at which the appeal ought to have been preferred; that it was now too late, and that they had no jurisdiction to examine into the merits of the appeal. [*108]

Leach now shewed cause:

The sessions having determined that in point of fact the parish to which the removal was made might have appealed to the adjourned sessions held in the Eastern division in July, within which district the cause arose, the only question is, whether in point of law the parish were not bound to lodge their appeal then. Although the divisions of the county are not legally so constituted, yet the practice of holding the sessions in the manner stated has been invariably observed; and therefore all persons residing within the jurisdiction must be taken to be cognizant of, and are bound by it. The adjournment day is on the Friday, and therefore in respect to the inhabitants of the Eastern division the sessions do not commence till that day; and the removal having taken place on the Wednesday preceding, the appellant parish ought to have entered their appeal on the Friday, pursuant to the constant practice; and he cited 19 Vin. Abr. 356, pl. 2, and 1 Sid. 149, to this effect. But if that were otherwise, and the Act of Parliament requiring the appeal to be made at the next sessions must be construed with reference to

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the original Sessions, and not to be held at another place by adjournment, still this application cannot be sustained; for in that case the appeal ought to have been preferred to the original sessions held in October, and not to the adjourned one, to which it was made. Therefore *aquâcunque viâ datâ* this rule must be discharged.

Partington and *Bayley*, *contrà*, were stopped by the Court.

LORD KENYON, Ch. J.:

The convenience and justice of the case are so obviously in conformity with the strict letter of the statute† that there can be no doubt on the proper construction of it. There is but one commission of the peace, and one Quarter Sessions held for the county in each quarter; although for convenience the magistrates hold the sessions first in one part of the county, and then by adjournment in the other part. The next Quarter Sessions therefore must necessarily mean the next original Quarter
[*109] Sessions held for the county; for the *adjournment is only a continuation of the same sessions. The removal therefore having been made after the commencement of the July sessions, the appeal was properly preferred at the October sessions following. Neither is there any thing in the objection that it ought then to have been made at the original sessions in October, for that it would be directly contrary to the practice which has always prevailed in counties where the sessions are adjourned from one place to another within the county; and his Lordship referred to *R.* v. *Monks Risborough*,‡ and *R.* v. *Hinderclave*.§

Per CURIAM:

Rule absolute.

† 43 Eliz. c. 3. ‡ Const's Bott. 834. § Ib. 835.

DOE ON THE DEMISE OF FORSTER *v.* WANDLASS.

(7 T. R. 117—121.)

1797. *Jan.* 21.

[117]

Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due; nor under the stat. 4 Geo. II. c. 28, s. 2, if there be a sufficient distress on the premises.†

EJECTMENT for lands in the county of Durham, which the lessor of the plaintiff held under a lease from the Dean and Chapter of Durham, and which had been under-let by him to the defendant by an indenture of demise dated the 16th January, 1795, for a term yet unexpired, reserving rent, in which was contained the following proviso; "That if it shall happen that the said yearly rents hereby reserved or any part thereof shall be behind and unpaid by the space of thirty days next after the said days of payment, &c. contrary to the true intent and meaning of these presents; or in case the said defendant, his executors, &c. shall at any time during the said term alien, &c.; then and in either of such cases it shall and may be lawful for the said J. Foster, his executors, &c. into the *said demised premises to re-enter, &c." There was also a covenant on the part of the defendant to pay rent, &c. &c.

[*118]

On the trial the plaintiff proved a demand of a half year's rent after the day on which it was due, and a refusal on the part of the defendant to pay it, before the re-entry. But it was agreed on both sides, that there was a sufficient distress on the premises during the whole time. On the part of the defendant it was objected at the trial that the lessor of the plaintiff could not recover either at common law, or under the statute of the 4 Geo. II. c. 28, s. 2; not by the former, because the rent was not demanded on the day when it became due; Co. Lit. 201; 7 Rep. 28; nor by the latter, because there was a sufficient distress on the premises. On the other hand the plaintiff's counsel relied on the express covenant of the defendant, that the lessor should re-enter upon the event which had happened, namely, the non-payment of rent when it became due. And to this opinion

† The case appears equally applicable to the provision in the later statute, 15 & 16 Vict. c. 76, s. 210. —R. C.

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LAWRENCE, J. inclined at the trial, and directed a verdict for the plaintiff. But upon reporting the case, upon a motion for a new trial, he said that upon re-consideration of the question, he was not satisfied with his former opinion. And he referred to 7 Co. 28, where the distinction is taken that upon a distress for non-payment of rent, a demand at the day is not necessary, as it is in the case of a re-entry, where the whole interest or estate is defeated, or where any sum *nomine pœnæ* is forfeited; in both which cases the demand ought to be made precisely at the day a convenient time before sunset; in the one case in respect of the condition and in the other in respect of the penalty. But in the case of a distress, he who hath the rent may demand it at what time he will; for no loss or penalty will thereon ensue, but only a remedy to come at his rent in arrear.†

Law and *Holroyd* shewed cause against the rule for setting aside the verdict. The present case is distinguishable from that in 7 Co. 28, and from Co. Lit. 201. What is there said applies only to the case of a reservation of rent, and to a clause of re-entry for non-payment pursuant to the reddendum: in which case the obligation of payment is not personal, but the rent is in the realty; and the lessor cannot re-enter without observing
[*119] strictly *all the niceties required by the common law. * * * In 5 Co. 40 b. it is resolved that by special consent of the parties a re-entry may be for default of payment of rent without demand of it. [They cited *Finch* v. *Throgmorton*, Moor. 291; *Chaloner* v. *Ware*, per HARVEY J., Hetl. 77.]

[120] [*Cockell*, Serjt. and *Wood*, *contrà*, cited Bro. tit. Demand, pl. 19, Co. Lit. 201; Cro. Eliz. 73; 4 Leon. 180.]

LORD KENYON, Ch. J.:

I think there has been some confusion in the argument on behalf of the plaintiff. There are cases in the books to this effect; where a lease is made for a term of years, determinable on such a thing being done, it determines when that thing is done in the case of a chattel interest; in the case of a freehold lease it is only voidable, and something must be done by the

† Vid. Dy. 51, b. 68, a. b., and *Goodright* v. *Cator*, Doug. 485.

lessor to shew his election to put an end to it. And some of the cases cited perhaps went on that ground. But this question arises on a power to re-enter. Now at common law great niceties were required in such a case; and it was to do away the necessity of complying with those requisites that the *Act of [*121] Parliament was passed. But this shews that all those niceties required by the common law must have been pursued before the Act; and the statute does not apply to this case, because there was a sufficient distress on the premises. Therefore the plaintiff must resort to his right at common law; and not having complied with the requisitions of the common law, he cannot recover.

Rule absolute.

MORTON *v.* LAMB.

(7 T. R. 125—131.)

1797. *Feb.* 1.

[125]

In an action for the non-delivery of corn at S. pursuant to an agreement whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a tender of the price or what is equivalent thereto; for the delivery of the corn and the payment of the price were concurrent acts to be done by the parties respectively at the same time; and each must aver performance or an offer to perform his part before he can maintain an action against the other.†

IN an action on the case the plaintiff declared against the defendant, for that whereas on the 10th Feb. 1796, at Manchester, in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant, had then and there bought of the defendant 200 quarters of wheat at 5*l.* 0*s.* 6*d.* per quarter, such price to be therefor paid by the plaintiff to the defendant, he, the defendant, undertook and then and there promised the plaintiff to deliver the said

† As to what are concurrent acts to be done, see notes to *Pordage* v. *Cole*, 1 Wms. Saunders, 319, and to *Cutter* v. *Powell*, 2 Sm. L. C.; *Atkinson* v. *Smith*, 14 M. & W. 695; *Withers* v. *Reynolds*, 2 B. & Ad. 882. On the question, which has been frequently discussed in the Courts of late, what is a refusal to perform a contract for the sale and purchase of goods by successive deliveries, see *Mersey Steel, &c., Co.* v. *Naylor* (1884) 9 App. Ca. 434, 53 L. J. Q. B. 497, where the cases are referred to and discussed; and *Norrington* v. *Wright* (1885) 115 U. S. 189.—R. C.

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corn to him (the plaintiff,) at Shardlow, in the county of Derby, in one month from that time, viz. of the sale; and then he alleged that although he (the plaintiff) always, from the time of making such sale for the space of one month then next following and afterwards, was ready and willing to receive the said corn at Shardlow, yet the defendant not regarding his said promise, &c. did not in one month from the time of the making of such sale as aforesaid, or at any other time, deliver the said corn to the plaintiff at Shardlow, or elsewhere, although he (the defendant) was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict.

Holroyd obtained, in the last Term, a rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. He said this was necessary on the principle established in many cases, particularly in *Thorpe* v. *Thorpe*,* *Callonel*. v. *Briggs*,† *Kingston* v. *Preston*,‡ *Jones* v. *Barclay*,§ and *Goodison* v. *Nunn*,‖ that when something is to be done by both parties to a contract at the same time, as in this case the tendering of the money and the delivery of the corn, there the party suing the other for non-performance of his part, must aver an offer at least at the same time to perform what was to be done by himself.

Law, *Wood*, and *Scarlett*, now shewed cause:

[They argued that the covenants were mutual and independent: but that if there were any precedence between them, the delivery ought to precede the payment.]

[128] *Holroyd, contrà.* * * *

[129] LORD KENYON, Ch. J.:

If this question depended on the technical niceties of pleading,

* Salk. 171.
† Ib. 113.
‡ Dougl. 3rd ed. 638.
§ Dougl. 3rd ed. 684.
‖ 4 T. R. 761.

I should not feel so much confidence as I do: but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time, and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and says "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is, whether that should or should not have been alleged. The case decided by Lord HOLT in Salk. 112, if indeed so plain a case wanted that authority to support it, shews that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice, must shew that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition * precedent, and some cases have been cited to [*130] prove it: but they do not appear to me to be applicable. In the one in Saunders,† the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned: but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only lead to confusion. In the case of *Campbell* v. *Jones*, ‡ I thought, and still continue of that opinion, that whether covenants be or be not independent of each other, must depend on the good sense of the case, and on the order in

† 2 Saund. 250.

‡ 1 R. R. 263.

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which the several things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

GROSE, J.:

It is difficult to reconcile all the cases in the books on the subject of conditions precedent; but the good sense to be extracted from them all is, that if one party covenant to do one thing in consideration of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance. Here the question is, what was the intention of the parties; they clearly intended that something should be done by each at the same time. The corn was to be delivered at Shardlow to the plaintiff for a certain price to be therefor paid by him, that is, at the time of the delivery; then the readiness to pay should have been averred by the plaintiff.

[130—131] LAWRENCE, J.:

[Gave judgment to a similar effect, resting his opinion on the authority of *Lea* v. *Exelby*, Cro. Eliz. 388, and *Collonel* v. *Briggs*, Salk. 113.]

Rule absolute.

1797. *Feb.* 8.

THE KING *v.* PAYTON.

(7 T. R. 153—156.)

[153]

A writ *de excommunicato capiendo* stated that the defendant was excommunicated in a cause of "defamation and slander merely spiritual;" and held sufficient.

If the sentence of the greater, instead of the lesser, excommunication be pronounced, it is only a ground of appeal: but this court will not quash a writ *de excommunicato capiendo* for that objection.

It is not necessary that the defendant should be resident in the diocese at the time of the excommunication; it is sufficient if he were there at the time of the citation.

THIS case, having been argued in last Michaelmas Term by *Manley* in support of the rule and *Warren*, *contrà*, stood over

for the opinion of the Court, which was now delivered, as follows, by

[154]

LORD KENYON, Ch. J.:

This was a motion to discharge the defendant out of custody, and to quash a writ of *excommunicato capiendo*, which stated that the Bishop of Worcester had signified that the official of the Consistorial Court of Worcester in a certain cause of defamation or slander merely spiritual, between Elizabeth the wife of William Hopkins, of the parish of Grimby in the county and diocese of Worcester complainant and Nathaniel Payton of the parish of Grimby aforesaid, the party accused, did, for the contumacy of the said Nathaniel Payton in not appearing, decree him to be excommunicated.

To this writ three objections have been made.

1st, That the causes of excommunication are not sufficiently stated.

2ndly, That the sentence is erroneous, in pronouncing the greater excommunication, instead of the lesser.

3rdly, Because it does not appear that at the time of the sentence the defendant was inhabiting within the diocese.

As to the first. The cases cited were 1 Rol. Rep. 136. There Fox being taken on an *excommunicato capiendo*, the significavit was, that he was excommunicated for not answering articles, without shewing what; and this was held bad, as it did not appear what the nature of the charge was in those articles. In that case *Arscot's* case is mentioned; where the excommunication was held bad, it only alleging that he was an inveterate schismatic. Another case was in Salk. 293, *The King* v. *Fowler*, where the writ was held bad, as the excommunication was recited to be *pro quibusdam causis subtractione decimarum sive aliorum jurium ecclesiasticorum*: this was held uncertain, as the *alia jura* might be matters not within their jurisdiction. But according to the report of this case in Lord Raym. 619, the reason assigned by HOLT, Ch. J. was, the not specially assigning the reason of the excommunication but in the disjunctive, and GOULD, J. thought it good, as the *sive* seemed to him accumulative; and HOLT, Ch. J. said, that if the writ had been *in causâ subtractionis quorundam*

THE KING v. PAYTON.

jurium ecclesiasticorum, it had been well. But in *The King* v. *Smith*, Strange 946, an *excommunicato capiendo* was quashed, being *in causâ defamationis sive contumacii*, for the uncertainty of the last word; but there was no objection on account of the first word not being sufficiently certain and explicit. And in *The King* v. *Kent*, Strange 950, the Court held an excommunication for slander or defamation not bad for uncertainty. [*155] *The present case is more certain than that, for it is alleged to be for defamation or slander merely spiritual. Those words remove all doubt, shewing that this was within the cognizance of the spiritual court.

As to the second objection, that the party was only liable to the lesser excommunication; that, if objectionable, is only the ground of appeal; it is merely that the judge has not proceeded according to the proper forms of the ecclesiastical court. †

As to the 3rd objection, the 23 Hen. VIII. c. 9; Moor 467; Latch. 174; Godbolt 191; Godolphin's Repertorium Canonicum 635; and Shower 17, were cited. As to the stat. of Hen. VIII. after reciting "that persons had been cited in courts out of the dioceses where they lived, and on certificate thereof had been excommunicated, it provides that no person from thenceforth should be cited out of the diocese, in which he should inhabit," but it does not prevent the sentence of excommunication being passed against those, who having been cited in their diocese, may afterwards remove out of it. The case in Latch. 174 is *Brown's* case. There the objection was, that the defendant was sued out of his diocese. This case proves nothing; as the defendant must be understood to have been cited out of the diocese. Godbolt 191 is *Fraunces* and *Powell's* case. It was a motion for a prohibition for citing the plaintiff out of his diocese contrary to the 23 Hen. VIII., and there Lord COKE said obiter that the 23 H. VIII. was in affirmance of the common law; for if a man be excommunicated in a foreign diocese, the same is void and *coram non judice*; as appeared by the 8 H. VI. and 2 H. IV. But this doctrine must be understood from the reference to the 23 H. VIII. as applying to the case of a citation out of the diocese.

† Cited in the judgment of Lord COLERIDGE, Ch. J. in *Martin* v. *Mackonochie* (1879) 4 Q. B. D. 787.—R. C.

Godolphin's Repert. Canon. 635, only refers to Moor 467; which is *Beaumont's* case, and is in these words; "*Beaumont* was taken on an *excommunicato capiendo;* and the significavit did not mention that he was commorant within the diocese of the bishop at the time of the excommunication, and it was adjudged uncertain, and the party discharged." Shower 17, is *Johnson's* case; and that, as far as respects this case, is merely a reference to Moor 467; for the objection in that case was the want of an addition. With respect to the case in Moor; as the necessity of being commorant at the time of the excommunication is not found to be so determined in any other book; and as such a doctrine would enable defendants, by shifting their diocese pending the suit, to avoid being amenable to the ecclesiastical court, * that case must be understood as proceeding on the ground of the defendant's not being within the diocese at any time during the suit. But the authority of that case may well be doubted.† For in the case of *The Queen* v. *Dig.* 11 Mod. 172, *Page* moved to quash a writ of *excommunicato capiendo;* his first exception being to the significavit upon the *excommunicato capiendo*, that it did not appear he was commorant in the diocese; and he cited Moor, 466, 467: he took two other exceptions to the writ; and the report concludes with saying "which exception (namely the third) the Court seemed to allow;" but no notice is taken of the first being allowed by the court. And in Sir T. Jones 89, in the case of the *Inhabitants of Bermondsey*, *Darnel* prayed that the defendants might be discharged because it did not appear by the certificate that they were commorant in the diocese of the bishop at the time of the excommunication; and he relied on Moor, 467, and Latch. 174. But the prisoners were remanded.

[*156]

We are therefore of opinion, on consideration, and on the examination of all these cases, that none of the objections are well founded, and consequently that

The rule must be discharged.

† It seems to have been overruled in *R.* v. *Burrard*, 1 P. Wms. 435.

1797.
Feb. 8.

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WEBSTER *v.* DE TASTET.

(7 T. R. 157—158.)

An action will not lie against an agent for not entering into an illegal contract of insurance, notwithstanding a prevailing practice on the part of underwriters to pay losses on such insurances without dispute.*

THE plaintiff, having been hired to go as a mate in a ship from the coast of Africa to the Havannah, for which he was to receive wages at the rate of 5*l.* per month, and three privilege slaves free of expense on the ship's arriving at the port of sale, directed the defendant, who was his agent at Liverpool, to get an insurance on his privilege; and for the defendant's neglect the plaintiff brought this action on the case against him. It appeared at the trial at the last Lancaster assizes before Lawrence, J. that the ship was lost on her voyage, and that the plaintiff thereby sustained a loss of 150*l.* reckoning 39*l.* 5*s.* for his chest and clothes, and the rest for the value of the slaves. It was objected on behalf of the defendant, that the plaintiff could not recover the value of the slaves, because they were not the legal subject of insurance, they being in the nature of seamen's wages. That point was reserved for the opinion of this Court, a verdict being taken for the plaintiff for 150*l.* with liberty to the defendant to move to reduce the damages to 39*l.* 5*s.* Accordingly,

Ward on a former day obtained a rule for that purpose, which was now opposed by

Holroyd, who admitted that if a policy had been effected the plaintiff could not have recovered the value of the privilege slaves in an action against the underwriters, but contended that, as in point of fact these kind of slaves were frequently the subject of insurance by mates at Liverpool, where the loss was always paid by the underwriters without disputing the question,

* The principle is applied in *Cohen* v. *Kittell* (1889) 22 Q. B. D. 680, 58 L. J. Q. B. 241, to the case of an agent employed for making bets, which (though not illegal) are made void by statute 8 & 9 Vict. c. 109, s. 18.—R. C.

the plaintiff might recover the value of them in this action, because by means of *the defendant's negligence the plaintiff had sustained the loss. But

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The COURT were clearly of opinion that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could have recovered in an action against the underwriters. They therefore made the rule absolute to reduce the damages to 39*l.* 5*s.*

Rule absolute.

SENAT *v.* PORTER.

(7 T. R. 158—159.)

1797. *Feb.* 8.

[158]

The plaintiff's agent shewed to the defendant, an underwriter, the captain's protest containing an account of the loss of the ship insured, demanding payment: held that this did not entitle the defendant to read the protest in evidence in an action on the policy.

ON the trial of this action on a policy of insurance at the Guildhall Sittings before Lord Kenyon a question arose respecting the admissibility in evidence of the captain's protest. The facts were these: when Vaux, the broker, applied to the defendant informing him of the loss and demanding payment, he produced the different papers relating to the subject, and among the rest the protest signed by the captain; the defendant told him he had looked into the papers, but that "there was a point in the case," and he refused payment. On the part of the defendant it was contended that the protest was made evidence in this case by the plaintiff, as a paper delivered by his agent to the defendant containing an account of the loss on which he rested his claim; and therefore that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment. Lord KENYON was clearly of opinion that the protest was not admissible in evidence, and the plaintiff obtained a verdict.

On a former day in this Term the Court reluctantly granted a rule calling on the plaintiff to shew cause why there should not

SENAT v. PORTER.

be a new trial, on the ground that the protest ought to have been received in evidence, that rule was now supported by

Gibbs, who argued it on the ground above stated.

Erskine, *Law*, and *Giles*, were to have shewn cause against the rule, but were stopped by the Court.

LORD KENYON, Ch. J.:

Great complaints have been made in the commercial world, and not without reason, of the enormous expense attending the trials of insurance causes; it therefore becomes the Court not to suffer that expense to be increased by unnecessary motions; and it was with great reluctance that I was *induced [*159] to consent to grant the rule to shew cause in this case. I have considered and reconsidered this question, and I cannot figure to my imagination any arguable point in it. That the protest *per se* cannot be evidence is admitted. Then what facts were proved to make it evidence in this case? Why, that it was in Vaux's hands, and that he shewed it to the defendant on an application for payment. But if that circumstance would render the protest evidence, it might equally be argued that the allegations in a plaintiff's bill in equity might be read against him merely because the bill with its contents must have been shewn to the defendant: but that cannot be pretended. If the plaintiff had availed himself of any part of this paper to prove his case, the defendant would have been entitled to read the whole of it: but the mere circumstance of Vaux's shewing the protest to the defendant when he applied to him for payment surely cannot render the protest evidence in this case.

GROSE, J.:

This protest was merely produced to the defendant as a paper containing the account of the loss given by the captain; if the captain had been called as a witness and had given a different account of the loss from that contained in the protest, the protest might have been produced to shew that he was not worthy of credit; but it could not be read on behalf of the defendant to prove any fact in the case.

LAWRENCE, J.:

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It seems to me that the protest does not become evidence on account of its having been voluntarily shewn by Vaux to the defendant any more than it would if the plaintiff had been compelled by a Judge's summons, to shew it to the defendant. It was not necessary for the plaintiff to shew this protest to the defendant before he brought his action; but the defendant might have obtained a Judge's summons to compel him to permit the defendant to inspect the paper; instead of this, Vaux, the plaintiff's agent, who wished to act candidly, voluntarily shewed this as well as the other papers to the defendant: but that does not amount to an admission of the facts contained in the paper.

Rule discharged.

MIDDLEWOOD *v.* BLAKES.

(7 T. R. 162—169.)

1797. *Feb.* 9.

[162]

A ship insured from A. to B. sails with intent to touch at C. To a certain point the voyage is the same; from that point there are three tracks to B., one of which is still on the course to C.; there are advantages and disadvantages attending each of the three tracks, and a captain bound for B. must elect according to circumstances. The ship passes the dividing point and takes the track towards C. with intent to put in there; but before she comes to the second dividing point where she must leave the track to B. in order to put into the harbour of C., is captured. The underwriter is discharged; because he was entitled to the advantage of the captain's judgment in electing which of the three tracks it was best to pursue when he came to the first dividing point.

THIS was an action on a policy of assurance on goods on board the ship *Arethusa* "at and from London to Jamaica." This ship was captured by an enemy in her voyage out on the *north [*163] side of St. Domingo, and carried into the Spanish port of that name: and the assured declared as for a total loss by capture. The defendant paid the premium into Court; and resisted the demand on the ground of a deviation from the voyage insured; As to which it appeared in evidence that the ship was entered outwards at the Custom-house, and the clearance of the goods was for Jamaica only, but that she sailed from London with irections to the captain to touch, in his way to Jamaica, at

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Cape Nicola Mole in the island of St. Domingo, in order to land some stores there pursuant to a charter-party entered into for that purpose, after which he was to proceed to Jamaica. The island of St. Domingo lies in the track to Jamaica; and consequently the course of the voyage from London to Jamaica, and from London to Cape Nicola Mole, is to a certain point exactly the same. From that point there are three tracks which a ship bound on the voyage to Jamaica may take; one of them to the southward immediately off St. Domingo, another still further to the southward, and a third to the northward of that island; in which latter after the ship in question had passed the dividing point of the three several tracks, but before she had reached the sub-dividing point of the continuing course to Jamaica and that leading into the port of Cape Nicola Mole, she was captured. With respect to the three several tracks to Jamaica from the dividing point which the ship passed, it appeared that those to the southward of St. Domingo were the most usual, especially in time of peace, and were the safest navigation; that the other to the northward was the shortest, but more difficult navigation, but was sometimes preferred in time of war by those who were acquainted with it, more especially in the present war, because great part of the island of St. Domingo, including Cape Nicola Mole, being in possession of the British force, there was less risk to be apprehended from privateers. But whether this or either of the other courses was the most advantageous to be pursued in any particular instance depended upon circumstances, upon which it was proper for the captain of the ship to exercise his judgment at the time. It was not pretended that the captain had in fact exercised any such judgment in selecting this course which he had taken: but it was evident that he had adopted it as the most direct and proper one to be taken for the purpose of going into the Cape, whither he was then bound.

[164] Lord KENYON before whom the case was tried, was of opinion that the defendant was discharged under these circumstances, because at the time when the ship was captured she was bound to a different place from that for which she was insured, and with a view to which the captain, under compulsion of his orders, had taken this particular track, and was not left at liberty to

exercise his judgment at the dividing point for the benefit of all concerned, as the assurers had a right to insist upon. And accordingly the jury found a verdict for the defendant, being, as they stated, unanimously of opinion that "the concealment of the intention to go to St. Domingo, vitiated the policy." A rule having been obtained, calling on the defendant to shew cause why the verdict should not be set aside and a new trial granted,

[The rule was argued by *Garrow* and *Gibbs* for the defendant, and by *Erskine*, *Law*, and *Giles* for the plaintiff.]

LORD KENYON, Ch. J.: [167]

I will not now inquire whether the cases cited were or were not properly decided; though perhaps if this were *res integra* I should have entertained some doubts. It is sufficient that those cases have been decided, and if the opinion which I gave at the trial tended to shake their authority I would abandon it: but it seems to me that our determination in favour of this defendant will not disturb any of the authorities. At the trial six witnesses, who had gone many voyages to Jamaica were examined on the part of the plaintiff respecting the common course of the voyage; two of whom had never taken the northern passage, and the other four said that the southern was the most usual, and that at all events the captain ought to exercise his discretion in each particular case whether he should take the one course or the other. When this policy was subscribed, it must be taken for granted that the defendant knew what was the common course of the trade, and expected that the most expedient voyage would be pursued by the captain, acting on the emergency of the occasion: but in fact that discretion of the captain was taken away in this instance, and on that I formed my opinion. That was a most important fact, and ought to have been communicated to the underwriters. I am therefore of opinion that the plaintiff is not entitled to recover, and that the rule for a new trial must be discharged.

ASHHURST, J.:

The facts of this case being once understood, I think there can be no doubt in the question. The underwriters supposed when

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they made this insurance that the captain would have gone the most common and usual way, or at least that he would have been at liberty to exercise his own judgment on the subject; instead of which it appears that he had no discretion, but was bound to take the northern passage. Had the intention of going to St. Domingo first been communicated to the underwriters, perhaps they would not have subscribed their policy, or if they had would have required a larger premium. Therefore on the ground that a full disclosure was not made to the defendant when he underwrote the policy in question, I think the rule ought to be discharged.

GROSE, J.:

If this case clearly fell within those which have been cited, I [*168] should on that ground have been induced to determine *in favour of the plaintiff; it being highly beneficial to the subject to adhere to former decisions. But this case was distinguishable from them: for in those cases the ship was taken before the dividing point, and when she was going in the only course she could take in order to arrive at her place of destination. There being no case to guide us in the decision of this, we must resort to principle. Now it must be remembered, that this cause was tried by a special jury of merchants of London, persons peculiarly conversant in commercial transactions, and who perfectly well knew the ordinary risk of such a voyage, and what would vary that risk; and they were of opinion that the underwriter was not liable. It appears that there are several courses to be taken to go to Jamaica, that the most usual passage is the southern one, but that the captain ought to have a discretion to pursue that which at the moment appears to be most advisable: but in this instance the captain had no such discretion; that circumstance should have been disclosed to the underwriters, and that not having been done I think the plaintiff cannot recover. The determination to take the northern passage at all events might very materially vary the risk; for when the ship came to the dividing point, the captain might discover that the northern passage was more dangerous owing to the circumstances of the moment, and yet he was obliged to take that course in this instance, when the underwriters supposed that he had a discre-

tion to take either the northern or the southern passage as he should think right.

LAWRENCE, J.:

When the motion for a new trial was made, I was inclined to think that this case fell within the authority of the several cases cited, and that as the ship was taken in the course of her voyage to Jamaica without stopping at St. Domingo, the plaintiff was entitled to recover: but in the course of this discussion I have changed my opinion. The principle on which the cases alluded to have been determined is, that where the ship is taken before she comes to the dividing point the underwriters run no additional risk by the captain's intention to deviate afterwards, and therefore it is to be considered as if no such intention had been formed. Now if in this case the ship had been captured before she took the northern course, I should have thought that the plaintiff would have been entitled to a verdict; † for in that case the ship would have run no additional risk: but here she sailed for Jamaica having a charter-party to stop at St. Domingo, and when *she came to the dividing point, which I considered in this [*169] case to be that where she begun to take the northern course, the ship was subjected to a risk for which the underwriters did not make themselves responsible; for at that moment the underwriters were entitled to have the benefit of the exercise of the captain's judgment whether he would go to the north or to the south. If it had appeared that the captain had really exercised his judgment in this case, and that he had taken the northern course as in his opinion the best at that time without being influenced by the charter-party to go to St. Domingo, I should have thought that a new trial ought to be granted: but I understand that he took this course, not after exercising his judgment, but because he was bound to go to Cape Nicola Mole; and therefore there is no ground for sending this to a new trial, though the jury have decided for the plaintiff on another ground, which in my opinion is not tenable.

Rule discharged.

† This cited and applied to the case in point by LE BLANC, J. in *Heselton* v. *Allnutt*, 1 Maule & Selwyn, 46, 51.—R. C.

1797.
Feb. 10.

[171]

WALKER *v.* THE EARL OF GROSVENOR.

(7 T. R. 171.)

The Court will not grant an attachment against a peer for not paying a sum of money awarded, though the defendant consent on condition that the attachment shall lie in the office for a certain time.*

Park moved for an attachment against the defendant for non-payment of the sum of 2,711*l.* pursuant to an award, which had been made under a rule at *Nisi Prius*, afterwards made a rule of this Court; and he observed that, unless this application were granted, the plaintiff would be without remedy, as no verdict had been taken.

Bayley was instructed on the part of the defendant to consent, provided the attachment lay in the office until the first day of next Term. But

The Court said that such an attachment could not be granted in this case, the defendant being a peer of the realm.

Rule refused.

1797.
Feb. 11.

[174]

WELLS and Another *v.* PICKMAN.†

(7 T. R. 174—178.)

The Court, upon the application of the sheriff, enlarged the time for his making a return to a writ of *fi. fa.* upon suggestion of a reasonable doubt whether the goods seized under the writ, were not covered by an extent afterwards issued at the suit of the Crown for malt duties, under the 28 Geo. III. c. 37, s. 21 for the purpose of inducing the plaintiff to go into the Court of Exchequer and there contest the question of right with the Crown in a more eligible manner than in this Court.

The plaintiff sued out execution against the defendant upon a judgment recovered in this cause, and the sheriff seized the defendant's goods under a writ of *fieri facias*; after which time

* See *Catmur* v. *Sir E. Knatchbull*, p. 489, *post*.

† As it has been ruled that the Interpleader Act did not apply where the right of the Crown is in question (*Candy* v. *Maugham* (1843) 13 L. J. C. P. 17), this case appears to be still an authority as to the mode of proceeding in such a case. In regard to the case of *Rorke* v. *Dayrell*, reported 2 R. R. p. 417, it should be noted that the decision upon the point there in question as to the effect of an extent in competition with a seizure under a *fi. fa.*, was overruled by the House of Lords in *Giles* v. *Grover* (1831) 1 Cl. & Fin. 72.—R. C.

an extent issued at the suit of the Crown for a debt due for certain duties of excise on malt. And the sheriff having been ruled by the plaintiffs to return the writ,

Dauncey on a former day in this Term moved to enlarge the time for the sheriff to make his return, suggesting that his object in so doing was to compel the plaintiffs to give the sheriff an indemnity, or to go into the Court of Exchequer and litigate the question with the Crown, so that the sheriff, who wished to do what was right might not be compelled to take the risk and expence of the litigation on himself. He said the question was of considerable difficulty on the construction of the Act of the 28 G. III. c. 37, s. 21, on which the seizure was made, whether at the time of the seizure † the goods remained "in the custody of the maker." And he cited, as authorities in support of the present application, *Shaw* v. *Tunbridge*,‡ where the application was *made by one of the parties, which the Court refused, saying [*175] that they only interposed in such cases to protect and assist the sheriff, when he desired it.

[He cited two other cases not elsewhere reported.]

Gibbs, on a former day shewed cause against the rule in this cause, contending that the sheriff was bound to make a return at his peril; and that though such indulgence had been shewn in some cases by consent of the parties, at the instance of the Court, yet the Court had no power to impose such terms on a plaintiff as that of obliging him to indemnify the sheriff against his consent; and saying that he was instructed in this case not to give such consent.

Lord KENYON, Ch. J. then said, That it was not merely for [176] the sheriff's asking that the Court would grant him time to make his return to a writ; but there must be some reasonable doubt suggested. But as it appeared to him that that had been sufficiently done in the present case, he thought the Court should, for the present, give the sheriff a week's time; to which the other Judges assented; and it was ordered accordingly.

† Vide *Rorke* v. *Dayrell*, 2 R. R. 417.

‡ 2 Blac. 1064.

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c.
PICKMAN.

At the expiration of that time,

Dauncey obtained another rule calling on the plaintiffs to shew cause why the time should not be further enlarged; stating that application had in the mean while been made to the Court of Exchequer on behalf of the sheriff. That the practice of that Court was, that upon the return of an inquisition, an eight-day rule is given for any person claiming the goods seized to come in and prefer his claim; in default of which, at the expiration of the time the writ of *venditioni exponas* issues: that time had in this case expired; and the plaintiffs had not put in any claim: but in favour of the sheriff that Court had consented to enlarge the time for the sheriff to make his return to the *venditioni exponas*, which had regularly issued; and had given another eight-day rule in order to enable the plaintiffs to put in their claim, and contest the question of right with the Crown. This method of proceeding, he observed, which was now opened to the plaintiffs in the Exchequer, was less circuitous and expensive than the present; and therefore the Court, by granting this application, will not put the plaintiffs in a worse situation than they would otherwise be in, if the sheriff were compelled to make his return.

Gibbs now shewed cause against any further enlargement of the time:

[177] * * * There is no reason for making a distinction in favour of the sheriff when one of the claimants happens to be the Crown. If this application be granted, there is no reason why the Court should not in all cases stay the proceedings, till one or other of the parties will agree to indemnify the sheriff.

LORD KENYON, Ch. J.:

It has been said that if the present application be successful, we shall establish a general rule that where there are contending parties, the Court will interfere in all cases whatever in favour of the sheriff: but I desire to have it distinctly understood that we lay down no such general rule; each case must depend on its own particular circumstances, and here I think there is sufficient reason to induce us to interfere. Then it was said

that the Court ought not to assist the sheriff, because the law allows certain fees, which are equivalent to his trouble and risk: but in fixing those fees the Legislature did not (I believe) take this risk into consideration; for the law does not suppose that there is any risk in cases of this kind, and in general the sheriff has the means of informing himself of the facts by the intervention of a jury so as to avoid all risk. But this is a case in which it may be difficult to decide whether the goods are bound by the extent, or whether they are liable to the plaintiff's execution; and it appears that the Court of Exchequer have anxiously endeavoured to put the case into such a situation that all the parties interested may come in and support their respective claims; therefore I think that the sheriff ought not to be put to the difficulty and hazard of deciding in this case, when there is a shorter mode pointed out of determining the rights of all the parties: a decision here will not decide the right of the Crown, whereas by the determination in the Court of Exchequer all the parties will be bound. Without therefore laying down any general rule, I think we ought in this case to follow up what we have done already by allowing further time to the sheriff to return the writ.

GROSE, J.:

It is not necessary now to determine that we will in all cases interfere and allow the sheriff time: but we have assisted sheriffs in many cases of this kind, and ought I think to give assistance to the sheriff in this case. Here is a question of *great importance peculiarly proper to be decided in the Exchequer, and that Court has given all the parties concerned an opportunity of insisting on their several rights; and all that the sheriff requires of us is, that until that question is decided, he shall not be obliged to return the writ. This application appears to me a very reasonable one. [*178]

The COURT then gave the sheriff further time until the second day of the next Term to return the writ.†

Rule absolute.

† See sequel to this in the Court of Exchequer, 3 Anstr. 852, reported *in loco post.*

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GILES AND OTHERS *v.* EDWARDS.

(7 T. R. 181—182.)

1797. *May* 5.

[181]

Where some act is to be done by each party under a special agreement, and the defendant by his neglect prevents the plaintiff carrying the contract into execution, the plaintiff may, in an action for money had and received, recover back any money he has paid under it.†

THIS action for money had and received was tried at the last Shrewsbury assizes before Mr. J. Lawrence. On the 6th of June, 1791, the defendant agreed to sell to the plaintiffs all his cordwood growing at Tredgodoer in Shropshire at 11*s.* 6*d.* per cord, ready cut; the wood was to be coaled and cleared from off the premises by Michaelmas, 1792, and the money was to be paid on the 1st of March, 1792. It also appeared that the custom was for the seller to cut off the boughs and trunks and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut sixty cords, ten of which he corded, and the plaintiffs re-corded half a cord and measured the rest. On the 8th of March, 1792, the plaintiffs paid the defendant twenty guineas; but the defendant neglecting to cord the rest of the wood, the plaintiffs brought this action to recover back the twenty guineas, as having been paid on a contract that had failed.

It was objected at the trial that this action could not be maintained, the contract being still open, and that the plaintiffs

[*182] *should have brought a special action on the case for non-performance of the contract, on the principle established in *Weston* v. *Downes*, Doug. 23; *Power* v. *Wells*, Cowp. 818; and *Towers* v. *Barrett*, 1 T. R. 133. That the plaintiffs could not now abandon the contract altogether, as they had acted under it. But the learned judge was of opinion that, as it was owing to the fault and negligence of the defendant, that the contract which was entire was not carried into execution, the plaintiffs

† Or he may insist on the enforcement of the contract as if he had performed his own part, *Roberts* v. *Bury Commissioners* (1869) L. R. 5 C. P. 310, 39 L. J. C. P. 129; *Mackay* v. *Dick* (1881) 6 App. Ca. 251.—R. C.

were at liberty to consider the contract at an end and recover back the money that they had paid, the consideration having failed. That what had been done by the plaintiffs could not be considered as an execution of the contract in part, for that all that they had done was merely to measure the wood and re-cord a very small part of it. The plaintiffs obtained a verdict: to set aside which, and to enter a nonsuit, a motion was now made by

Wigley on the above ground: but

The COURT were clearly of opinion that the directions given at the trial were right.

LORD KENYON, Ch. J. said:

This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound to take a part of the wood only.

Rule refused.

JOHN HIRST, ADMINISTRATOR *DE BONIS NON* OF JAMES HIRST *v.* SMITH.

(7 T. R. 182—183.)

1797. *May* 6.

[182]

In assumpsit brought by an administrator *de bonis non* the promise may be laid to have been made to the first administrator.

THIS was an action upon promises. There was one set of counts on several promissory notes given by the defendant to James Hirst in 1774, and on the common money counts, in which the promises were stated to have been made to the intestate; and another set in which the promises were alleged to have been made to John Hirst, the first administrator of James Hirst, and not to the plaintiff the administrator *de bonis non*.

In consequence of a plea of the Statute of Limitations the first set of counts was laid out of the question, but a verdict was given for the plaintiff on the remaining counts.

Chambre now moved in arrest of judgment, because no [183]

HIRST v. SMITH.

promise was laid to have been made to the plaintiff, but to the former administrator, between whom and the plaintiff there was not privity. He admitted that a promise in fact made to the first administrator, would have taken the case out of the Statute of Limitations so as to have supported a count stating the promise to the plaintiff, because the intestate's estate was then vested in the first administrator; but he contended that in order to enable the plaintiff to recover, it should appear on the record that the promise was either made to the intestate or to the plaintiff.

LORD KENYON, Ch. J.:

It is admitted that if the promises had been laid to have been made to the plaintiff, a promise to the former administrator would have supported the declaration: but there is no reason why the plaintiff should be obliged to state a fiction on the record; here the declaration seems adapted to the truth of the case* and I am not aware of any technical rule of law that shews the declaration to be bad. The defendant's objection rests on this broad foundation that there is no privity between the former administrator and the plaintiff, the administrator *de bonis non:* but that proposition certainly is not true in its extent. Suppose the former administrator had entered into an agreement for the sale of the lease of a chattel interest belonging to the intestate, and had died before the agreement was completed, the administrator *de bonis non* stands in such privity of estate that he would be compelled to carry that agreement into execution.

ASHHURST, J.:

As it is alleged that the promise was made to the person from whom the plaintiff deduces his title, and between whom and the plaintiff there is a privity of estate in law, it is the same as if it had been stated that the promise was made to the plaintiff himself, because the law recognizes the relation.

Per CURIAM: *Rule refused.*

* See reference to this point by BLACKBURN, J. in *Moseley* v. *Rendell* (1871) L. R. 6 Q. B. 338, 343, 40 L. J. Q. B. 338; and PEARSON, J. in *In re Watson* (1884) 53 L. J. Ch. 305, 307, 50 L. T. 205.—R. C.

THE KING *v.* THE JUSTICES OF FLINTSHIRE.

(7 T. R. 200—201.)

1797. *May* 10.

[200]

An appeal against an order of removal may be entered at the next Sessions but one after the order is executed, if there be not a reasonable time between the execution of the order and the next Sessions to make inquiries respecting the pauper's settlement.

THIS was a rule calling on the defendants to shew cause why a mandamus should not issue, commanding them to receive an appeal against an order of two justices, by which T. Kirkham and his wife and family were removed from Mold in the county of Flint, to Leek, in Staffordshire.

The order was dated on the 24th of September last, and executed on Monday the 3rd of October at four o'clock in the afternoon at Leek, which is at the distance of fifty-four miles from Mold, where the Flintshire Sessions were holden on Thursday the 6th of October. No appeal having been entered at those Sessions, the Justices at the January Sessions refused to receive the appeal, though it was stated to them, and now verified by affidavit, that the overseer of Mold who conveyed the paupers to Leek could only speak the Welsh language, and that the overseer at Leek who received them could not understand him; that near a week elapsed before the parish of Leek could gain any information respecting the settlement of the paupers, and consequently that they were not in a situation to appeal at the Michaelmas Sessions.

On these facts, *Gally* obtained a rule for this mandamus in the last Term.

Leycester, who now shewed cause against it, produced an affidavit in answer; in which it was stated that the overseer of Mold when he conveyed the paupers to Leek, took one Price with him for the purpose of explaining the circumstances of the case, and who on parting said "he must make the best of his way home to attend the Sessions at Mold;" it was also stated that the order of removal was not executed before the 3rd of October on account of the resistance and threats of the pauper.

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Under these circumstances he contended that the parish of Leek ought to have entered their appeal at the Michaelmas Sessions, according to the case of *R.* v. *The Justices of Herefordshire*, 3 T. R. 504; there having been a reasonable interval between the execution of the order and those sessions in which inquiry might have been made relative to the settlement of the paupers.

LORD KENYON, Ch. J. (stopping *Gally* in support of the rule):

We ought not to decide hastily against the words of an Act of Parliament: but some reasonable time ought to be given to the parish appealing, to enable them to inquire whether or not it will
[*201] be *proper to enter an appeal. In this case the order of removal which was made on the 24th of September, was kept in the overseer's pocket until the eve of the sessions, and was then executed at the distance of more than fifty miles from the place where the appeal was to be lodged. And though the sessions were holden at Mold on Thursday, in general they are holden on Tuesday, and the overseers of Leek might fairly have conceived that the sessions for Flintshire would be holden on the very next day after the order was executed. Under these circumstances therefore I think that the justices at the following sessions in January, ought to have received this appeal, and consequently that this rule should be made absolute.

Per CURIAM:

Rule absolute.†

1797.
May 10.

[201]

CHATER *v.* BECKETT.

(7 T. R. 201—205.)

By the Statute of Frauds, no action will lie in respect of a parol promise to pay the debt of another and also to do some other things. The plaintiff cannot separate the two parts of such a contract.

THE first count of this declaration stated that the plaintiff was about and intended to sue out a commission of bankrupt against J. Harris, who was indebted to him in 500*l.*, and that prepara-

† See *R.* v. *Justices of Surrey* (1880) 6 Q. B. D. 105, where this judgment is referred to as an authority, in a case relating to an appeal against a poor-rate.—R. C.

tory thereto he had been put to great expense in procuring different meetings of Harris's creditors, but that he was advised not to prosecute such commission but to proceed at law for the recovery of his debt; and that he had sued out a special *capias ad satisfaciendum* against Harris, &c.: whereupon in consideration that the plaintiff at the instance of the defendant would stay all further proceedings against Harris, and would accept certain bills of exchange drawn or accepted by the defendant for a certain part, to wit, 10*s.* in the pound of his said debt as a satisfaction for the whole, the defendant undertook and promised to give the plaintiff such bills for the same, and to pay all the expenses which the plaintiff had been put to in and about the said intended commission, the writ, and the meetings of the creditors; that the plaintiff stayed all proceedings against Harris and accepted such bills, &c. yet that the defendant had not paid the said expenses or any part thereof. The second count was similar to the first, except that it was confined to the costs of suing out the writ; and the third count only varied from it in this respect, that it only extended to the costs of the *proceedings in the [*202] intended commission of bankrupt. There were also the general counts for money paid, and for money had and received.

At the trial the plaintiff's counsel stated this case; that the plaintiff who had struck a docket against Harris, was induced not to prosecute the commission of bankrupt, but to sue him at law for the recovery of his debt, and having sued out a writ against him, some of Harris's creditors were anxious to take a composition for their debts provided all of them would agree to it; and to effect this scheme the plaintiff called several meetings of Harris's creditors, at the last of which a composition of 10*s.* in the pound was proposed, which all the creditors, except the plaintiff, consented to take: but as the plaintiff had been put to great expenses in striking the docket against Harris, suing out a writ, and calling the creditors together, he would not agree to take that composition unless those expenses were also paid, in consequence of which the defendant promised to pay those expenses and to accept bills drawn by the plaintiff on him to the amount of the composition. The plaintiff accordingly drew bills on the defendant to that amount, which the latter accepted and paid; but

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the defendant refusing to pay the plaintiff's expenses amounting to 20*l.* 13*s.* the plaintiff paid them to the attorney, and brought this action to recover the same from the defendant on his undertaking. But this undertaking not being in writing, Lord KENYON was of opinion that the case came within the Statute of Frauds,† and nonsuited the plaintiff on his opening: referring to the case of *Read* v. *Nash*, 1 Wils. 305. A rule *nisi* was obtained in the last Term to set aside the nonsuit; and when the case was now called on, the plaintiff's counsel said that even though this were a case within the Statute of Frauds the plaintiff might recover on the general count for money paid to the use of the defendant.

Mingay and *Lawes* shewed cause against the rule for a new trial:

The plaintiff is not entitled to recover either under the special or general counts; not under the former, because the promise not having been reduced to writing the case falls within the Statute of Frauds; nor under the latter, because this was not
[*203] *money paid to the defendant's use. * * *

Gibbs and *Wigley*, in support of the rule, [relied upon *Read* v. *Nash*, *supra cit.*]

[204] LORD KENYON, Ch. J.:

When the cause came on to be tried, I referred to the case of *Read* v. *Nash*, to shew that this was a case within the Statute of Frauds; and though the Court ruled that that case itself was not within the statute, what was said by Lord Ch. J. LEE is decisive to shew that this promise is void ‡ by the statute. That was an action not founded on any debt but for an assault: and he said "Johnson was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him if the cause had been tried; he never was liable to the particular debt damages or cost." Whereas

† By stat. 29 Car. II. c. 3, s. 4.

‡ This expression, which runs through the judgments, is inaccurate. Obviously, all that is meant is that an action will not lie by reason of the statute.—R. C.

in this case Harris was indebted to the plaintiff, and the defendant undertook to pay part of that debt and to pay certain other expenses. The promise therefore was certainly void in part by the statute; and the agreement being entire, the plaintiff cannot now separate it and recover on one part of the agreement, the other being void. And if that agreement be void, there is an end of the case; for where there is an express promise, another promise cannot be implied. I lament extremely that exceptions were ever introduced in construing the Statute of Frauds; it is a very beneficial statute, and if the Courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought.

GROSE, J.:

It seems admitted that part of this promise is void by the statute but it is one indivisible contract, and the plaintiff cannot recover on any part. Then it is urged that the plaintiff may recover on the general count: but in order to support that count there should be evidence of the plaintiff having paid a sum of money that the defendant was bound to pay; whereas here the plaintiff, not the defendant, was bound to pay these expenses.

LAWRENCE, J.:

It is clear that the plaintiff cannot recover on the special counts. Then the question is, Whether on the transaction as stated he can support the general count for money paid to the use of the defendant? The defendant's was not a promise to pay the attorney but to pay the plaintiff the expenses that he had incurred: but the plaintiff was originally liable to pay these *expenses to his own attorney; and when he paid them he only paid his own debt; therefore this cannot be considered as money paid to the use of the defendant. [*205]

Rule discharged.

1797. *May* 12.

HARRISON *v.* JACKSON, SYKES, AND RUSHFORTH.

(7 T. R. 207—210.)

[207]

Articles of partnership under seal do not imply power to any partner to bind the other by deed.

THIS was an action of covenant upon an agreement of three parts stated in the declaration to have been made on the 10th of July, 1794, between the defendants, describing them as merchants and partners of the first part, W. and J. Harrison of the second part, and the plaintiff of the third part, of one part of which said agreement, as being sealed with the seal of the said W. Sykes for himself and the other two defendants, the plaintiff made a profert in court. The declaration then stated the agreement and covenant of the defendants, the subject matter of which agreement and covenant appeared on the agreement to be a partnership transaction on the part of the defendants, and to have been entered into on a full and valuable consideration received by them as partners. The declaration then stated the breach of covenant, whereby the plaintiff had sustained damage to the amount found by the jury.

To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Issue being joined, the cause was tried at the sittings after Hilary Term, 1797, before Lord Kenyon at Guildhall, when the jury found a verdict for the plaintiff, damages 477*l.* 13*s.* 6*d.* and costs 40*s.*, subject to the opinion of this Court on the following case.

The defendants were partners. The agreement stated in the declaration was produced; and the subscribing witness proved that it was executed in his presence by the defendant Sykes in the following form;—"For Jackson, Self, and Rushforth; W. Sykes:" But neither Jackson or Rushforth was present at the execution. The question for the opinion of the Court was, whether such execution of the agreement by the defendant Sykes were binding on the other defendants Jackson and Rushforth.

[208]

Dampier for the plaintiff:

As the deed was executed by one partner in a partnership transaction for a full and valuable consideration received by all

the partners, it is binding on them although they were not all present. "One piece of wax may serve for all the grantors if every one put his seal on the same piece of wax, or another do so for them." Perk. sect. 134. In *Mears* v. *Serocold*,† the defendant pleaded *non est factum* to an action brought on a joint and several bond: at the trial it appeared that Jackson was in partnership with Serocold when the bond was given, and that the consideration of the bond was a partnership debt due from Jackson & Serocold to the plaintiff, and that Jackson first executed the bond for Serocold, and then for himself; Lord MANSFIELD ruled that for a partnership debt one partner had authority to execute a bond for another, and thereupon directed a verdict for the plaintiff. Now that is a stronger case than the present, because there the action was brought against the partner who did not execute the bond and not against him who did, the bond being several as well as joint. * * *

Giles for the defendants: [209]

It not appearing in this case that Sykes, who executed the deed for himself and his partners, had any authority from the others to bind them by deed, it must be taken that he had no such authority; the execution therefore, as far as it affects them, must rest wholly on the general power, which is incident to the relation of partners. But the law recognises no such general power, by which one partner may bind the rest by deed. In this respect the instance of one partner acting for the others is analogous to the case of an agent acting for his principal, who cannot bind his principal by deed without being authorised by deed so to do. Com. Dig. "Attorney" (C. 1) and (C. 5). * * *

Dampier in reply:

This is not like the case of an agent acting for his principal, for he cannot bind the principal beyond the scope of the particular power given to him: but the power that each partner has, arises out of the interest that he has in the partnership concerns and from the dominion that he has over the *partner- [*210] ship effects. * * *

† Sittings in Easter Term, 1785, at Guildhall, cor. Lord Mansfield, Ch. J.

HARRISON v. JACKSON.

LORD KENYON, Ch. J.:

I should be sorry to have it supposed that this case was reserved from the least particle of doubt that I had on the subject: the parties came to *nisi prius* with the facts admitted on both sides; for if the case had been opened there, I should certainly have given a decisive opinion against the plaintiff. The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the *nisi prius* case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said that, if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed: but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners.

Per CURIAM:

Postea to the defendants.

1797. *May* 12.

[210]

BURNETT *v.* KENSINGTON.

(7 T. R. 210—226.)

If an insurance be effected on fruit, and the policy contain the usual memorandum, "corn, fruit, &c. warranted free from average unless general, or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, though no part of the loss arise from the act of stranding.

THIS was an action by the assured against the underwriter on a policy of insurance on fruit on board the ship *Commerce* at and

from Malaga and Velez Malaga to Plymouth and Portsmouth; in which was contained the usual memorandum, whereby corn, fish, salt, fruit, flour, and seed, were warranted free from average unless general or the ship should be stranded, &c.

The plaintiff by his declaration averred that the ship set sail for Malaga on her intended voyage, but by the perils of the sea, was stranded, bulged, and destroyed, and the goods on board were wholly lost to the plaintiff, &c. [211]

At the trial before Mr. Justice Lawrence and a special jury, at the sittings at Guildhall after last Michaelmas Term, the jury found a verdict for the plaintiff [subject to the opinion of the Court on a case stated, by which it appeared that the damage to the cargo in question was caused by a leak made by the ship striking on a rock, and not by the stranding which took place afterwards under the direction of a pilot, for the purpose of saving the ship and cargo].

[*Park* for the plaintiff, in argument, relied on the case of *Cantillon* v. *The London Assurance Company*,* in 1754, where Lord Ch. Just. RYDER considered the clause as in the nature of a condition, and that by the ship's being stranded the assured was let in to prove his whole partial loss.

Erskine, for the defendant, relied upon *Wilson* v. *Smith*, 3 Burr. 1550, *Nesbitt* v. *Lushington*, 2 R. R. 519. The case of *Cocking* v. *Fraser*, E. Term, 25 Geo. III., Park on Insurance, 1st ed., pp. 22 & 129, was also mentioned in the argument.] [218]

LORD KENYON, Ch. J.: [221]

We have had abundant opportunity of considering and re-considering this case: but I confess that, though my mind has at times been wavering, it at last rests at the point where it first set out. When this question arose and was judicially decided in 1754, I wish, if any doubt had then arisen on the opinion which was then formed by a jury of merchants under the directions of Lord Ch. J. Ryder, that instead of silently acquiescing in that

* Cited in *Wilson* v. *Smith*, 3 Burr. 1553, and reported in 2 Magens, 385. [Magens, Nicolas: An Essay on Insurances, 2 vols. 1755.—F. P.]

BURNETT v. KENSINGTON.

decision, the defendant had resisted it by a motion for a new trial, or that all the underwriters had corrected the ambiguous terms of this memorandum. But that opinion was acquiesced in by the parties to that cause; and it appears that the great insurance companies in London have since left out the words in the memorandum "unless the ship be stranded."

The words of this policy are in general terms, including all cases: then comes this memorandum, "corn, fish, salt, fruit, flour and seed warranted free from average, unless general or the ship be stranded." This therefore lets in a general average; and I do not know how to construe the words grammatically, but by saying that if the ship be stranded, then it destroys the exception and lets in the general words of the policy. If a general provision be made in any deed or instrument, and it is there said that certain things shall be excepted unless another thing happen which gives effect to the general operation of the deed, if that other thing does happen it destroys the exception altogether. My two opinions that have been referred to, the one in the *nisi prius* case, and the other in *Nesbitt* v. *Lushington*, have no weight with me as judicial authorities, though I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion in those cases. Without enquiring into the reasons for introducing this exception, on the gram-
[*222] matical construction of the *whole I have no doubt. But let us also consider some of the cases decided on this subject. That of *Cantillon* v. *The London Assurance Company* I take from a better authority than that of Magens; I take it from Burr. Rep. as it was cited by *Sir F. Norton*, who being in possession of a great portion of *nisi prius* business at that time, was probably counsel in the cause, and who cited it in the presence of many persons who could have corrected him if he misrepresented it. *Sir F. Norton* stated that the ship being stranded (and not merely touching the ground as supposed by Magens) the insured recovered an average loss; for (he said) Lord Ch. J. RYDER and a special jury considered it as a condition, "and that by the ship's being stranded the insurer was let in to claim his whole partial average loss." Now that is a judicial decision on the very point by a special jury of merchants under the directions of

a learned judge, acquiesced in at the time by every person, and the great assurance companies in London altering the form of their policies in consequence of it. Probably the private underwriters were aware of it; but they chose to continue their policies in the whole † form in order to run away with the insurance business from the great companies; for if they did not intend to be answerable for such a loss, they would have altered the terms of this memorandum. Generally speaking if I were bound to decide between the opinions of Lord MANSFIELD and Lord Ch. J. RYDER, perhaps I should be guided by the former in preference to the latter: but what fell from him in the case of *Wilson* v. *Smith* was only an *obiter dictum;* and I confess it does not bring conviction to my mind. With regard to *Cocking* v. *Fraser*, it is sufficient to say that there was no stranding in that case: what was there said likewise was only an *obiter dictum*, and I cannot subscribe to the opinion there given; it was there said, "if the commodity specifically remains, the underwriter is discharged: but if fish be deteriorated by the accident of stranding, I take it that the underwriters would be answerable though the article specifically remained. If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said "unless for losses arising by stranding." But in the body of the policy they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is "free from average unless general, *or unless the ship be stranded;" so that [*223] if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and the grammatical construction of the policy: and thinking so, I am bound to give the same opinion I formerly gave, not because I gave that opinion before, but because I am convinced by the reasoning that led to it.

[ASHHURST, J., GROSE, J., and LAWRENCE, J. delivered judgments to a similar effect.] [223—226]

Postea to the plaintiff.

† *Sc.* old.

1797. *May* 16.

[228—233]

GORDON AND ANOTHER, ASSIGNEES OF J. CAMERON, A BANKRUPT, *v.* THE EAST INDIA COMPANY.

(7 T. R. 228—237.)

Where A. a trader, and an officer in the East India Company's service, assigns his privilege, consisting of shipping goods from the East Indies to England, to B. for a valuable consideration, and in order to evade the bye-laws of the East India Company, which prohibits such assignment, the goods were shipped, entered, warehoused, and sold by the company in A.'s name, and the proceeds carried to his account, but before A. received those proceeds from the company he became a bankrupt; held that his assignees were entitled to recover the amount in an action for money had and received against the East India Company who retained the same; this being such a possession of "goods and chattels" in the bankrupt, as falls within the reputed ownership clause, 21 Jac. I. c. 19, s. 11.†

THE plaintiffs declared in assumpsit for money had and received to the use of Cameron before his bankruptcy, and also for money had and received to the use of the plaintiffs his assignees since his bankruptcy. At the trial at the sittings after last Michaelmas Term at Guildhall, the jury found a verdict for the plaintiffs, for 664*l.* 13*s.* 8*d.* [subject to the opinion of this Court on a case whereby it appeared that Cameron being an officer in the H. E. I. C. S., having the privilege of shipping goods in their ships, had assigned his privilege for a valuable consideration to Taylor. The goods had to be shipped in the name and as the privilege of Cameron, and to be sold at the Company's sale as Cameron's, and when sold the proceeds were entered in the East India Company's books in the name of Cameron. Cameron became bankrupt, while there was an amount standing to his credit on the Company's books on account of these goods. The question was whether Cameron's assignees in bankruptcy were entitled to this money.

After argument :]

LORD KENYON, Ch. J. :

The cases cited and relied upon by the defendant will not

[*234] be shaken by a decision against him in this case. *There is no

† See the judgment of the majority in *Cooke* v. *Hemming* (1868) L. R. 3 C. P. 334, 345. But observe Mr. Justice WILLES' weighty argument in dissent from that judgment.—R. C.

doubt but that ships at sea may be transferred by the delivery of the grand bill of sale, or that goods at sea may be assigned by delivery of the bill of lading. The cases, in which it has been holden that the personal chattels of the wife may be settled in trustees, will also remain in force. How the question as to this last class of cases would be now determined, if he were *res integra*, I will not presume to say: I lament that it ever was decided that the possession and apparent ownership of personal property may be in one person, and the title to it in another; for I think it would have been better for the public if the possession of such property (except in the case of factors) were to carry the title with it. The case of real property is in a different situation; no purchaser is satisfied with the mere possession of an estate; before he purchases he calls for the title deeds, and examines whether or not the possessor be entitled to the estate. But the possession of personal property is generally the title on which the world relies.

The statute of James, on which the present question arises, appears to me to be a wise regulation. It was passed when the commercial interests of this country were extremely well understood, and in a reign when as many wise provisions were made for regulating both the internal and external trade of the country as were ever made in any equal number of years. And in my opinion every Act of Parliament that tends to prevent fraud ought to receive an extensive construction, and not to be frittered away. Now let us see what this case is; Cameron, who was the first mate of an East India ship, had by the indulgence of the East India Company the privilege of sending goods in their ship to a certain amount; by the private regulations of the East India Company, these privileges are only to be for the proper use of the respective officers, and never to be disposed of unless the Company give special leave for that purpose; it appears also that Taylor shipped these goods in Cameron's name and as his privilege; that they were entered in the East India Company's books as Cameron's, and sold as his; it further appears that Taylor never could have got possession of these goods until January, 1795, and that no alteration as to the name of the owner of the goods could have been made either in the ship's books or at the

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[*235]

India House before Cameron's bankruptcy. Now in this case there were no documents which Taylor could have carried to market for the purpose of transferring this property, as in the case of bills of *lading: but the actual property was in Cameron one of the officers on board this ship; and all the evidence of title, on examining the Company's books, shewed that the property was in Cameron. And the question now is, Whether or not this be a case within the statute 21 Jac. I. c. 19? If it be not, I really do not know what case does come within it. That statute meant that creditors should not be deluded by false appearances. In this case false appearances were held out to Cameron's creditors: if they had made any inquiries at the ship respecting the title to these goods, it would there have appeared that they were entered as part of Cameron's privilege and in his name; if application had been made to the East India Company, they would have been informed that the goods were Cameron's, because no other person had a right to put goods on board under the head of Cameron's privilege; if they had inquired at the time of the sale, the answer would still have been the same. Suppose Cameron had been desirous of raising money on the credit of these goods, the person advancing the money would reasonably have concluded that they were the property of Cameron, because they were entered in his name. In short, in whatever light this is considered, the whole is delusion. The parties examining into Cameron's right could only have concluded that the goods were his property; whereas if the defendant's argument were to prevail, those who trusted to these appearances would be deluded by finding that another person was the owner by means of a secret transaction between Cameron and Taylor. Then it was said that all this transaction was fair; as between Taylor and Cameron it may be so; but as between Cameron and his creditors it is not fair, but delusion. Therefore it appears to me that Cameron had the possession, order and disposition of these goods within the meaning of the statute, and within the case of *Ryall* v. *Rowles*,† in which it was decided that choses in action were goods and chattels within that Act. If we were to give effect to Taylor's demand in this case, we should defeat all the provisions

† 1 Ves. Sen. 372; 1 Atk. 177.

of this Act of Parliament, which ought rather to be extended in its construction than controlled.

ASHHURST, J.:

This case appears to me to come directly within the words and meaning of the statute of James, the object of which was to prevent persons in trade obtaining false credit by the possession and apparent ownership of goods not their own, and thereby deluding their creditors. Under these circumstances any person would have advanced money to Cameron on the credit of these *goods, he being the ostensible owner of them. This is a very beneficial Act of Parliament; and though individuals may in some instances suffer by it, the benefit which the public derive from it, infinitely outweighs such private inconveniences. [*236]

GROSE, J.:

It is always unfortunate when the goods of one person are taken to pay the debt of another. By this Act of Parliament if a trader has in his possession the goods of another person with the consent of that other, and has the order and disposition of them, and the trader becomes a bankrupt, his commissioners may dispose of them for the benefit of his creditors. But this Act was passed in order to prevent a trader's obtaining a false and delusive credit by the possession of the goods of another; and if by having such possession the trader gain a false credit, the goods are to be distributed under this Act to those who may be supposed to have given him credit. Now this case comes both within the words and meaning of this Act of Parliament. Cameron was the reputed owner of the goods, otherwise they could not have been brought to England in this manner, for they were brought here as part of his privilege; he had the order and disposition of them; they were carried to the East India Company's warehouse and entered in their books as his property, and sold as his, no notice having been given to any person before the bankruptcy that the goods were not the property of Cameron; and the question is, Who is entitled to the produce of them? Under this Act of Parliament the commissioners are entitled to dispose of it for the benefit of Cameron's creditors. Then it was

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argued that the money in the East India Company's hands was not the species of property that this statute had in view: but it is a chose in action, and it was determined in *Ryall* v. *Rowles* that a chose in action is within the provisions of the Act.

LAWRENCE, J.:

It seems to me that the assignees are entitled to recover the produce of these goods on this ground, that Taylor cannot have a better title than he would have, if the colour which was given to this transaction were true. Now supposing these really had been the goods of Cameron, and he had agreed to assign them to Taylor on their arrival here and on Taylor's accepting a bill of exchange; on the arrival of the goods and acceptance of the bill by Taylor, Cameron should have transferred them to Taylor or to his assignee; after such transfer Taylor or his agents should either have taken actual possession of the goods or given notice that they were his property, otherwise he enabled Cameron to have the *apparent ownership [*237] of the goods. When these goods were sold at the East India Company's sale, the money was received by the Company to the use of Cameron: in which case according to *Ryall* v. *Rowles*,† in order to assign a chose in action so as to take the case out of the statute, notice should have been given to the East India Company. But no such notice was given, and for want of it Taylor gave Cameron an opportunity of defrauding other persons by the ostensible ownership of the goods. It was said indeed that, even if notice had been given, the East India Company would not have suffered any alteration to be made in their books before Cameron became a bankrupt: but that is immaterial as far as respects this case; notice might have been given notwithstanding, and the effect of it would have been to prevent any persons who inquired at the East India House into the title of these goods, being defrauded, because there they would have been informed that the goods were not the property of Cameron, though they were entered as his in their books. Such notice therefore might have prevented the very fraud against which the Act of Parliament intended to guard.

† 1 Ves. Sen. 372.

But two cases have been much relied on, *Collins* v. *Forbes*,* and *Falkener* v. *Case*.† With regard to the former, I was by no means satisfied with the decision; it struck me that when the timber was delivered to the officers of government in Kent's name and for his use, he had the possession, and order and disposition of it; but the Court proceeded on this ground that the bankrupt had only the possession of the goods for a special purpose, and had not the order and disposition of them. But that is not the case here; it is not pretended that Cameron had not the order and disposition, as well as the possession of these goods. And as to *Falkener* v. *Case*, it was clear that the policy was not in the bankrupt's possession, for he had pawned it to the broker; and therefore that was not a case within the statute 21 Jac. I. So that neither of those two cases militates against our decision in this case.

Postea to the plaintiffs.

ALVES *v.* HODGSON.

(7 T. R. 241—243.)

1797. *May* 17.

[241]

The plaintiff cannot recover upon a written contract made in Jamaica, which by the laws of that island was void for want of a stamp.‡

THE declaration stated that on 25th July, 1796, at Jamaica viz. at London, &c. in consideration that the plaintiff at the request of the defendant would enter himself as a mariner on board the ship *Neill Malcolm*, whereof the defendant was then master, and bound on a voyage from Jamaica to London, and would proceed on the voyage as such mariner, and would do his duty as an able seaman, the defendant undertook and to the plaintiff promised three days after the arrival of the said ship *Neill Malcolm* at London to pay him as such mariner fifty guineas as wages for

* 3 T. R. 316; 1 R. R. 712.

† 1 Bro. C. C. 125.

‡ Confirmed by judgment of Lord ELLENBOROUGH in *Clegg* v. *Levy*, 3 Camp. 166. A statutory exception is now made in the case of Bills of Exchange, as to which the former authorities were conflicting. Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 72. See *Re Marseilles Co.* (1885) 30 Ch. D. 598, 55 L. J. Ch. 116.—R. C.

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his service during the voyage. It then stated that the plaintiff on the same day, &c. entered on board the said ship as a mariner, to serve during the voyage, and that he did accordingly serve and do his duty on board the same, until the 29th July, 1796, at which time the ship was on the high seas; and although the plaintiff was ready and willing and offered to remain and serve on board the vessel, &c. for the residue of the voyage, yet the defendant contriving and intending to injure the plaintiff, would not permit him to remain on board the vessel, but without any reasonable cause and against the consent of the plaintiff, discharged him from his service as such mariner, and obliged him to quit the vessel. It then stated the subsequent arrival of the ship at London, &c. and the refusal of the defendant to pay the plaintiff his wages; and that in consequence of such dismissal of the plaintiff from the vessel, he had lost the advantage which would otherwise have accrued to him from serving on board during the remainder of the voyage. The second count stated that in consideration that the plaintiff at the request of the defendant, had entered himself as a mariner on board the said vessel on the same voyage, the defendant made his certain note in writing subscribed with his hand, and thereby three days after the arrival of the said ship *Neill Malcolm* at London, promised to pay the plaintiff by the name of William Alves, the sum of fifty guineas if the plaintiff did his duty as an able seaman; it then stated that the plaintiff did accordingly enter, and all the other facts mentioned in the first count. There were other counts for work and labour, upon a *quantum meruit*, and upon an account stated.

[242] At the trial before Lord Kenyon at the sittings after last Term at Guildhall the plaintiff proved the facts as stated in the declaration, and produced the note mentioned in the second count, which was dated "Jamaica 25th July 1796," and was in these words: "Three days after the arrival of the ship *Neill Malcolm* at London, I promise to pay to W. Alves, fifty guineas, if he does his duty as an able seaman;" signed "John Hodgson." There was no stamp on the paper, and the defendant gave in evidence a law of Jamaica passed before the date of the note, whereby a certain stamp was imposed on all inland bills of ex-

change, and on all promissory and other notes; † and contended that the paper in question not being stamped, was void by the operation of that law, and not being evidence in the country where it was made, it could not be received in evidence in a court of justice here. And Lord KENYON being of that opinion, a verdict was taken for the plaintiff generally, with leave to the defendant to move to enter a nonsuit on that ground.

Accordingly *Mingay* on a former day having obtained a rule for that purpose,

Garrow and *Espinasse* now shewed cause against it:

1st, the paper given in evidence was not a promissory note, but an agreement, and therefore not within the scope of the law of Jamaica. By that agreement the plaintiff undertook for his good conduct as a sailor during the voyage, and the captain in consideration thereof undertook to pay him fifty guineas for his labour. In *Carlos* v. *Fancourt* in error,‡ the Court held that a promise in writing to pay money on a contingency could not be declared on as a promissory note within the 3 & 4 Ann. c. 9, because it was not a negotiable instrument; but they also held that it might be declared on as a special agreement; and accordingly the declaration in this case is so framed. But 2ndly, if the Court should hold this to be a promissory note within the law in question, still they will not suffer the defendant to avail himself of an objection which is merely founded on a revenue law in a foreign country, and does not enter into the merits of the transaction between the parties. The operation of such a law, is merely local, and has never been holden proper to be *enforced by a foreign judicature.§ Besides, 3rdly, there is a count on a *quantum meruit;* and if the paper could not be received [*243]

† The law in question imposed a stamp duty on "every piece or sheet of paper, &c. on which shall be written any inland Bill of Exchange, draft or order, &c. promissory or other note, where the sum or value expressed therein or made payable thereby, shall be above 20*l.* and not exceeding 50*l.* the sum of 1*s.* 3*d.* when the sum shall be above 50*l.* and not exceeding 200*l.* the sum of 1*s.* 8*d.* &c."

‡ 5 T. R. 482; 2 R. R. 647.

§ Vid. what is said by Lord MANSFIELD in *Holman* v. *Johnson*, Cowp. 343.

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as evidence of the special undertaking, then the plaintiff was at liberty to prove his actual service for five days on board the ship, and to recover for the value of his labour during that time, as it was proved that he did not desert his duty, but was forced out of the ship by the defendant's contrivance.

Mingay, *contrà*, insisted that the contract was entire, and unless the plaintiff was entitled to recover for the whole he could not recover at all. In going upon the count for the *quantum meruit*, he will be estopped by the defendant's shewing that there was a contract in writing. It was never known that where a contract being legally framed, cannot be enforced as such, the plaintiff can avail himself of the execution of part of it to recover *pro tanto*.

LORD KENYON, Ch. J.:

This is a promissory note, though not negotiable, and as it is not stamped, it cannot be received in evidence. Then it is said that we cannot take notice of the revenue laws of a foreign country: but I think we must resort to the laws of the country in which the note was made: and unless it be good there, it is not obligatory in a court of law here. But as there is a count on a *quantum meruit*, which was not considered at the trial, and as the instrument could not be given in evidence for want of the stamp, there must be a new trial in order to give the plaintiff an opportunity of recovering on the general count; therefore let there be a new trial.

Rule absolute for a new trial.

1797. *May* 18.

[254]

MYERS AND THREE OTHERS *v.* EDGE.

(7 T. R. 254—257.)

A promise in writing directed to A. B. and C., a house in trade, to pay for goods to be furnished to another cannot be enforced in an action by B. and C. to recover the value of goods furnished after A. had withdrawn from the partnership.

THE declaration stated that in consideration that the plaintiffs would sell to one T. Duxbury a quantity of cotton twist, the de-

fendant undertook to pay as much as it should be worth if T. Duxbury did not when thereunto requested; that the plaintiffs accordingly sold and delivered to T. Duxbury a certain quantity, but the defendant refused to pay, &c.; to which the defendant pleaded the general issue. At the trial before Rooke, J. at Lancaster, the plaintiffs to take the case out of the Statute of Frauds, gave in evidence the following letter written by the defendant dated January 15th, 1794. "To Messrs. Myers, Fielden, Ainsworth, & Co. If you please you may let the bearer, Thomas Duxbury, have six bunches of twist more than I told you, and I will be answerable for them as before: and after this I will be answerable for one pack and no more; so when he pays you for the first half pack, you may let him have another, and so on till I tell you to the contrary; and you may make the invoice to us both," &c. At the time when this engagement was entered into, Ainsworth was a partner in the same house with the plaintiffs, and continued so till May, 1795; during which time many parcels of goods were delivered to Duxbury which were all paid for by him, who was debited for them in the plaintiffs' books. The goods in question were furnished to Duxbury by the plaintiffs alone after Ainsworth had retired from the partnership, and Duxbury having failed to pay for them, they demanded payment of the defendant, who said it should be settled, and requested time; but afterwards refusing to pay, this action was brought.

It was objected on the part of the defendant that the action could not be maintained by the present plaintiffs, because Ainsworth, with whom also the contract was made, was not joined with them, and he not being a partner at the time when the goods were furnished. [This was argued (after a verdict for the plaintiffs) on a rule to show cause why the verdict should not be set aside, and a nonsuit entered.]

LORD KENYON, Ch. J.: [256]

I think that the rule ought to be made absolute. We are to judge on the contract that the parties have made, and ought not to substitute another in lieu of it. Here the defendant contracted with Myers, Fielden, Ainsworth, & Co. Perhaps the defendant, when he entered into this contract, had great confidence in

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Ainsworth, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished; at least it is too much for us to say that, after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners. I disclaim going on the ground of fraud in this case, the jury not having found that there was any fraud. If on a new trial the plaintiffs can produce any other evidence to affect the defendant, they will have an opportunity of doing so. But we cannot say that a contract, that on the face of it imports to have been made with five, ought to be construed to be a contract made with four persons only. I very much approve of the case cited from 3 Wilson.†

ASHHURST, J.:

This is not a contract made with a corporation; it is made with a partnership consisting of a certain number of individuals: and when one of the partners left the business, it put an end to this engagement. If the plaintiffs had intended to furnish goods to Duxbury after this alteration in the partnership, they should have required a new undertaking.

GROSE, J.:

The letter, on which the plaintiffs relied as an engagement on the part of the defendant to the partnership house is directed to the partners nominatim: and therefore when Ainsworth ceased to be a partner, the plaintiffs should have applied to the defen-

[*257] dant to renew his undertaking. I agree with *the doctrine established by the case in Wilson, which is an authority for our determination against the plaintiffs.

LAWRENCE, J., declared himself of the same opinion.

Rule absolute.

† *Wright* v. *Russel*, 3 Wils. 532.

MARRIOT *v.* HAMPTON.

(7 T. R. 269—270.)

1797. *May* 20.

[269]

Where money has been paid by the plaintiff to the defendant under the compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

THE defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord KENYON was of opinion at the trial that after the money had been paid under legal process, it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses* v. *Macfarlan*, 2 Burr. 1009, was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial; relying on a subsequent case of *Livesay* v. *Rider*, E. 22 Geo. III. B. R. where on a similar motion the Court held such an action maintainable. And he pressed for the opinion of the Court in order that the question might be settled.

LORD KENYON, Ch. J.:

I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent even to grant a rule to shew cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused: but this goes much further.

MARRIOT v. HAMPTON.

ASHHURST, J. of the same opinion.

GROSE, J.:

It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated * are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

[270] LAWRENCE, J.:

If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overrule the former judgment; which is too preposterous to be stated.

Rule refused.

1797. *May* 20.

HARPER *v.* CARR.

(7 T. R. 270—276.)

[270]

A churchwarden taking a distress for a poor's rate under a warrant of magistrates is entitled to the protection of the 24 G. II. c. 44, in having the magistrates made defendants with him in an action of trespass. The granting of such warrant by the magistrates is a judicial and not a ministerial act; and they ought first to summon the party, and hear what he has to say in his defence.

TRESPASS for seizing and carrying away a ship's anchor at Liverpool. It appeared at the trial before Rooke, J. at the last assizes for Lancaster, that the defendant, who was a churchwarden, took the anchor in question as a distress for non-payment of a poor rate under a warrant of magistrates, which was produced. Whereupon it was contended, on behalf of the defendant, that this action could not be maintained against him alone, but that the magistrates under whose authority he had acted ought also to have been made defendants under the

* Which his Lordship read from the note of it.

24 Geo. II. c. 44, s. 6, by which it is enacted "that no action shall be brought against any constable, headborough, or other officer, &c. for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand in writing hath been made, &c. by the party intending to bring such action, &c. of the perusal and copy of such warrant, and the same has been refused, &c.; and in case after such demand and compliance therewith, &c. any action shall be brought against any such constable, headborough or other officer, &c. without making the justices who signed or sealed the said warrant defendants, that on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justices, &c." The learned Judge thought that a churchwarden distraining for a poor's rate was not within the protection of that statute, and overruled the objection. The defendant then entered upon his defence, upon which many other questions arose, which are unnecessary to be here stated as the judgment of the Court was confined to the objection first mentioned. The jury found a verdict for the plaintiff under the Judge's direction for the value of the distress, with leave to the defendant to move to enter a non-suit if the Court thought the objection fatal.

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Cockell, Serjt. accordingly on a former day in this Term obtained a rule *nisi* for that purpose; saying that there was no distinction in this respect between a churchwarden acting under the warrant of magistrate in distraining for a poor rate or under an order of removal. In all cases he is in the situation of any other officer on whom a duty is thrown by law which he is bound to execute. * * He referred to the case of *Nutting* v. *Jackson*,* where it was expressly holden that an overseer of the poor distraining for the poor's rate under the justices' warrant is within the protection of the Act of Geo. II.

Law, *Chambre*, *Heywood*, and *Scarlett*, now shewed cause against the rule; and relied on the case of *Milward* v. *Caffin*,† as shewing that it was not necessary to join the magistrates in

* E. 13 Geo. III., Bull. N. P. 24.

† 2 Black. Rep. 1330.

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this action, and consequently that the churchwarden was not within †the protection of the Act of Geo. II. on this occasion.

[†272] * * *

[274] LORD KENYON, Ch. J. (stopping *Cockell*, Serjt. and *Topping* in support of the rule):

I will not enter into a consideration of the other questions about the legality of the rate, the only question here is whether or not we should put the construction on this very beneficial statute, that the Legislature intended it should receive. The Act provides that, when a warrant is granted to the inferior descriptions of mankind who cannot judge of the propriety of it, they shall not be harassed with actions for executing it, but that the magistrate who granted it shall bear the responsibility himself. It is objected however that the statute does not extend to churchwardens and overseers, but is confined to the officers of the peace: but if that be the meaning of the statute, all mankind have been acting under a mistake ever since it passed; for it has always been extended to surveyors of the highways, who have an extensive jurisdiction on the subject of the highways. In *Wilkes* v. *Lord Halifax* it was indeed decided that the Act did not extend to one of the King's messengers, and there it was said that it was confined to those who were obliged to take upon them the execution of offices of this description without any reward. Nor can it be doubted but that it extends to overseers of the poor in some instances, *e.g.*, in executing an order of removal. In one of the Acts of Parliament ‡ the description is "constables and certain other his Majesty's officers:" but in this statute the latter expression is dropped, and it speaks of "constables, headboroughs, or other officers," acting in obedience to any justice's warrant. I will not now enter into an examination of the case of *Milward* v. *Caffin*, because that was decided on the form of the action, a replevin, to which it was ruled that this statute did not extend: had it not been for that decision I should have thought that the Act did extend to a replevin; and certainly convenience requires that it should, otherwise it is in the plaintiff's power to evade the provisions of the Act by adopting a particular mode of

‡ See the preamble to 7 Jac. I. c. 5.

proceeding which depends on his own choice. Perhaps however it may be shewn on examination that that case was rightly decided, whatever my doubts may have been about it. Then it was said that justices of the peace act ministerially in granting a warrant of distress for non-payment of a poor rate, in the same manner as when they allow a rate, and a dictum of Mr. J. FOSTER has been alluded to in support of it: but it is observable that neither of the other *three Judges thought the two cases [*275] alike; and I think that the case of allowing a poor rate is the single instance in which the justices act ministerially; but there the allowance alone does not put the rate into a state to be enforced, for it is still open to an appeal by any person who thinks himself aggrieved. But in the instance of granting a warrant of distress the justices exercise a discretion after enquiring into the circumstance of the case. It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted, as we decided in *R.* v. *Benn*; † and on that summons many circumstances may appear to shew that a warrant of distress ought not to be granted. I will not even suggest what my opinion is respecting the validity of this rate, because it is not necessary to the decision of this case; but I am very clearly of opinion, on the preliminary point, that the magistrates who granted the warrant should have been made parties to the suit and that all those other steps should have been taken that the stat. 24 Geo. II. requires.

ASHHURST, J.:

This is a very wise provision made for the protection of all inferior officers acting under the warrant of a justice of the peace; and on this ground I am of opinion that the magistrates ought to have been made defendants in the cause. The case of *Nutting* v. *Jackson* is a decision directly in point.

GROSE, J.:

I remember the case of *Nutting* v. *Jackson*, which underwent a great deal of discussion, and the determination of which was satisfactory to every person who heard it. And that was not the

† 6 T. R. 198.

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first determination on the point; for *Mr. Lucas*, in argument, cited a case in 1770, before Lord Ch. Just. WILMOT, who decided at *nisi prius* that an overseer of the poor was an officer within the meaning of the statute 24 Geo. II. It is true that the Court of Common Pleas expressed a different opinion in *Milward* v. *Caffin*: but it is sufficient to say of that case that it was determined on the form of the action, and that the attention of the Court was not necessarily called to this point as it was in the case of *Nutting* v. *Jackson*. I think it would be mischievous to overrule the case of *Nutting* v. *Jackson*, which was a convenient and proper decision. Therefore, without repeating the reasons already given by the Court, I am of opinion on the authority of that case, which cannot be distinguished from the present, that the rule should be made absolute.

[276] LAWRENCE, J.:

The ground on which I doubted the authority of *Nutting* v. *Jackson* when this motion was first made was, that the magistrates in granting a warrant of distress act merely ministerially; if they had no discretion on the subject it would be hard that they should be bound to grant a warrant of distress which they thought illegal and afterwards discuss the propriety of the rate at their own expense. And if they had no discretion in granting the warrant, I should have doubted of that case. But the cases now referred to shew that the justices do not act ministerially. Besides the statute 43 Eliz. c. 2, requires a warrant signed by two justices to enable them to levy the money due, which would have been unnecessary if the justices were not to exercise a discretion whether they should grant or refuse the warrant: that circumstance, I think, shews that the Legislature did not intend that a warrant should be granted as a matter of course, but that the justices should first inquire into the merits of the case. The cases cited shew that the party ought to be summoned before the magistrates before they grant a warrant of distress; and then they must exercise their own judgment in the same way that they do on the hearing of any other complaint. Then it seems to be immaterial in this respect whether the warrant be granted to the overseer or to any other person. Con-

sidering therefore that such a warrant is not granted as of course, and that this very point was decided in *Nutting* v. *Jackson*, I think that the rule must be made absolute.

HARPER v. CARR.

Rule absolute.

K. B. TRINITY TERM.

THE KING *v.* GEORGE CROSSLEY, ONE, &C.

1797.

(7 T. R. 315—320.)

June 20.

[315]

The crime of perjury in an affidavit sworn before the Court is complete by making the false oath, and to constitute the offence it is not necessary that the affidavit should be filed or exhibited in Court.

THIS was an indictment against the defendant for perjury, which stated that in Easter Term 36 Geo. III. Thomas Stokes made a certain application to the Court of our lord the now King before the King himself against G. Crossley, W. Clarke and T. Briarly, he, the said defendant, before and at the time of making the said application, being one of the attornies of the said Court, &c. to wit, at Westminster, in the county of Middlesex. That on Friday next after one month from Easter-day, in the thirty-sixth year aforesaid, the said T. S. upon the affidavit of himself and others named, and a certain paper-writing thereunto annexed being read by the said Court, &c. obtained a rule, &c. against the defendant, W. C. and T. B., whereby it was ordered that they, on notice, &c. should on, &c. answer the matters contained in the said affidavits, and attend the said Court in person at the time of answering as aforesaid. The indictment then set forth the substantive charge in Stokes' affidavit, which was that he had found in the defendant's possession a sheet of paper having the proper stamp for affidavits thereon, with the name W. Clarke written thereon at the left side of the paper, and the name and words "Thomas Briarly, a Master Extraordinary in Chancery," written on the right side of the paper, and no other writing thereon. It then stated another rule of court made on Saturday next after the morrow of the Ascension, &c. in the thirty-sixth year aforesaid, ordering that the third day of the then next Term should be further peremptorily given to the defendant, W. C.

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and T. B., to answer the matters contained in the affidavit in the said rule, &c. and attend the said Court in person. And "that the said defendant contriving and intending to stop the course of public justice on 30th May, in the thirty-sixth year aforesaid, [*316] did come *in his own proper person to the Court of our said lord the King before the King himself, the said Court then being at Westminster in the county of Middlesex, and did then and there produce to the said Court a certain affidavit in writing of him the defendant to be exhibited to the said Court for the purpose of discharging the said rules, and then and there before the said Court was duly sworn and took his corporal oath, &c. that the contents of the said affidavit of him (the defendant) were true, the said Court then and there having a lawful and competent authority to administer the said oath of the said defendant and to take and receive his said affidavit. That the said defendant being so sworn, &c. did then and there, to wit, on the said 30th of May in the thirty-sixth year, &c. at Westminster aforesaid, in the said county of Middlesex, in and by his affidavit aforesaid, upon his oath aforesaid, before the said Court, the said Court then and there having a lawful authority to administer the said oath, &c. and to receive his said affidavit falsely and corruptly, &c. depose and swear," &c. The indictment then set out the defendant's affidavit in answer† to the rule then depending against him, and the several assignments of perjury thereon; concluding "and so the jurors, &c. say that the defendant, on the said 30th May, &c. at Westminster aforesaid, in the said county of Middlesex, before the said Court of our said lord the King before the King himself, the said Court then and there having competent authority to administer the said oath, &c. by his own act, &c. in and by his affidavit aforesaid, &c. did falsely, &c. commit wilful and corrupt perjury against the peace, &c."

The defendant having been found guilty upon this indictment, and being brought up to receive judgment in the last Term, offered several objections in arrest of judgment. * * *

† The defendant by this answer attempted to get rid of the presumption of malpractice against him on account of his possession of such an instrument, by stating that it had been put into his hands many years before to be used as an affidavit in a certain cause then depending.

*To these objections, which were not argued at the bar, another was added by

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Erskine, *Garrow*, and *Manley*, on behalf of the defendant; that it did not appear that after the affidavit, on which the perjury was assigned, was sworn by the defendant it was exhibited in this Court or filed. It was indeed stated that the defendant did produce to the Court a certain affidavit to be exhibited, &c.: but it plainly appears from what follows that the paper-writing (there improperly called an affidavit) was not such at that time, but became so afterwards by the defendant's being sworn to the truth of the facts contained therein; and after the time when only it could properly be styled an affidavit, it does not appear to have been filed or in any manner exhibited or made *use of by the defendant in Court. They admitted that if the crime of perjury could be committed merely by swearing to a false affidavit, although no use were afterwards made of it in a judicial proceeding, then this objection failed; but if that were not so, it followed necessarily that there ought to be an averment in the indictment that it was used or filed of record, without which perjury could not be assigned thereon. That this appeared as well from the common practice of counsel in advising their clients not to make use of affidavits, the truth of which they had reason to doubt, and keeping them from the files of the Court to avoid exposing the swearers to the peril of an indictment for perjury, as also from the general form of the precedents, which either state that the affidavits on which perjury is assigned were exhibited or produced before the Court, or refer to them as filed of record, which supposes them to have been used or read in Court. *R.* v. *Cross*, Trem. P. C. 136; *R.* v. *Jole*, ib. 138; *R.* v. *Brooks*, ib. 151, 155. And they also cited *R.* v. *Taylor*, Skin. 403, Holt's Rep. 534, where on an indictment for perjury in making an affidavit, HOLT, Ch. J. ruled at Guildhall, "that it ought to be proved that the affidavit was read and used against the party, for without producing and using it the bare making an affidavit will not be sufficient." †

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† It appears upon reference to the record of this case which is of Mich. 5 W. & M. Roll. 9, that the indictment concluded *contra formam statuti*, &c.

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Milles and *Dauncey*, *contrà*, were stopped by the Court.

LORD KENYON, Ch. J. :

The argument in arrest of judgment only shews that there are some precedents of indictments for perjury in the books, containing words that are not inserted in this indictment. But that argument proves too much, because it tends to prove that all subsequent indictments must contain all the nonsense that has been inserted in the precedents drawn of late years.

Let us examine the foundation of this objection on principle, on practice, and on the precedents. First as to principle: This prosecution effects to bring to justice a person who has been guilty of a most enormous offence: his guilt or innocence must depend on his own act and on the motive by which he was actuated at the time. The affidavit, on which the perjury is assigned, might have been sworn in a distant part of the kingdom; it might have been sent up by the post, and detained in the
[*319] hands of any person *here for some time; and according to the doctrine urged on behalf of the defendant, the guilt or innocence of the person making the affidavit in the country is to depend on the circumstance of the person into whose hands it comes, bringing it forward. But surely the guilt of the party cannot depend on the act of another person, when all that he had to do has been already consummated. In the instance of making an affidavit in the country the party is not to be indicted here where the affidavit may happen to be used, but in the county where the offence was complete by making the false oath. Then the practice has been referred to, and it is said that counsel have sometimes recommended it to the party who has made the affidavit not to produce it in court, but to put it into his pocket: in one sense it may be of great importance to the party to put his affidavit into his pocket, to prevent its being produced in evidence against him on an indictment for perjury: but it is ridiculous to suppose that his guilt or innocence can depend on such an act. With regard to the precedents; it is admitted that there are many, on which the parties have been convicted, in which it is not stated either that the affidavit was exhibited or filed in Court. On looking into the precedents referred to in Hawkins,

I was at first startled, seeing that they alleged that the affidavit had been exhibited or filed: but they are all on the statute, and are therefore distinguishable from this case, for there an action is given to the party injured by the false oath. I am therefore of opinion that there is no foundation for this or for any of the other objections, which we have considered, though they have not been argued.

ASHHURST, J. declared himself of the same opinion.

GROSE, J.:

Whether we consider this case on principle, the definition of the crime of perjury, or the practice, I think there is no foundation for this objection. There is no precedent in which it is alleged that the affidavit was used. It is indeed stated in some of them that it was exhibited by prout pater per recordum, &c.: but that is not necessary.

LAWRENCE, J.:

Several objections have been made to this indictment, all of which, except one, have now been given up by the defendant's counsel. Had they been argued, I think I could have given satisfactory reasons to shew that none of them could be maintained. With regard to the objection relied on by the defendant's counsel: I think that the crime of perjury was complete by the defendant's swearing the affidavit for the purpose of *dis- [*320]
charging the rule against him, and that the crime cannot depend on the subsequent use of it, the defendant being equally guilty of perjury though no use had been afterwards made of it. The case in Skinner was an indictment on the statute,† and therefore it cannot govern this case. I have looked with great attention through a variety of precedents, manuscript as well as printed, and I do not find that it is stated in any one instance that the affidavit was used. It is stated in them that when the party swore he exhibited the affidavit to the person or the Court before whom it was sworn, and that the contents of it were false; the common form is, that he came before the person or the Court,

† This appeared from the indictment on the records of the Court.

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and exhibited the affidavit or paper-writing, that person or Court having competent authority, &c., and that he swore falsely and corruptly such and such things, without adding that any use was afterwards made of the affidavit; and then it proceeds to set out the assignments of perjury. Then it was said that all those cases may be distinguished from the present, because it appears in them that the affidavit was exhibited as appears by a reference to the files of the Court. But the principle is, that whatever is material to the essence of the crime cannot be supplied by intendment: then is not the use made of the affidavit (if at all) to be supplied by intendment? A reference is made to the files of the Court to see what was done, and from thence it is to be intended that the party used the affidavit: but that is contrary to the general rule that no material thing is to be intended; from which it follows that this kind of reference does not supply what the defendant's counsel say is necessary to be averred, because that would be to supply it by intendment. But even that reference is not always made; it was not either in *R.* v. *Hawkins*, Trem. P. C. 167, or in *R.* v. *Stone*, ib. 148. I have also directed a search to be made in the Crown-office for precedents of indictments of this kind: it is not alleged in any one of the nine that I have seen that any use was made of the affidavit; and in four of them there is no reference to any affidavit on the files of the Court. And in the case of *R.* v. *C. Atkinson* * which was very much examined both by the bench and at the bar, the indictment was drawn in this form, and this objection was not even taken.

Rule discharged.

* E. 24 Geo. III. B. R.

GOODRIGHT, ON THE DEMISE OF BALCH, *v.* RICH AND GOVETT.

(7 T. R. 327—335.)

1797. *June* 23.

[327]

The lessor of the plaintiff in ejectment is bound at the trial to prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent rule to confess lease, entry and ouster, if the defendant contest his possession.*

EJECTMENT for thirty acres of land, twenty acres of meadow, and twenty acres of pasture, with the appurtenances, situate in the parishes of Over Stowey and Nether Stowey, in the county of Somerset. The defendants pleaded the general issue, and entered into the common consent rule as tenants. The cause was tried before Mr. Justice Buller, at Taunton, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. The lessor of the plaintiff proved his title to certain lands in the parishes mentioned in the declaration of ejectment, which lands were called Clutsome's, Dunscombe's, Landsey's Breach, Griddle's Breach, and the Gore Platt, which were the premises in question. The defendants proved that they were not, nor ever had been in possession of any part of the premises in question. The only point reserved at the trial was, whether the defendants after entering into the conditional rule could be permitted to prove that they neither were or had been in possession of the premises, which the plaintiff by the evidence had entitled himself to. If such proof on the part of the defendants were admissible, a nonsuit was to be entered; otherwise the verdict was to stand.

[The point was argued at great length by *Praed* for the lessor of the plaintiff.]

Newbolt, contrà, was stopped by the Court. [333]

LORD KENYON, Ch. J.:

This has certainly been *vexata questio;* when I went the circuit as counsel, the case in Buller's Ni. Pri., in which it

* Although some of the forms here referred to are obsolete, the principle seems applicable to an action for the recovery of land strictly so called.—R. C.

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was said "If there be but one defendant as tenant in possession, the plaintiff need not prove him in possession," was supposed to be law; and when a case afterwards came on before me on the Home Circuit I ruled accordingly, not thinking it necessary to prove the defendant in possession. But I was never called on to consider the question accurately till now; and when we consider the reason of the thing, it seems wonderful that any question could seriously have arisen upon this subject. On the trial of an ejectment two parties come to litigate the title to an estate, the person claiming, and the person who is supposed to withhold improperly, the possession: but as soon as it turns out that the latter is not in possession, it seems to me that the cause is ill constituted between those two persons. The proceedings in ejectment were instituted in order to try who is entitled to the possession of an estate on title: when the declaration is delivered the lessor of the plaintiff claims in general terms so many acres of land, so many messuages, &c. which communicates but little intelligence to the person served with the declaration. If the latter happen to be in possession of any land falling within the description in the declaration, he must defend in order to preserve his own right; then it would be unjust that a verdict should be found against him though he can prove a title to every acre of land in the parish of which he was ever in possession; and yet this is the consequence of the plaintiff's argument. Two rules have been made by the two Courts, differing indeed in words, and, as the plaintiff now contends, differing also in substance. In the Common Pleas the defendant enters into the consent rule as to all the lands in his possession: then on that rule it is necessary for the plaintiff to prove the defendant in possession of the land that he claims. But it is said that the meaning of the rule of

[*334] this Court is different: I should be extremely sorry to find *that in a fictitious proceeding, instituted for the more easy attaining of justice, different rules were to obtain in the different courts. If we were bound to decide in this case in favour of the plaintiff, it would be necessary to alter the rule of our court immediately. This point however came under the consideration of the Court in the case reported in Wilson,† where it was holden that the

† *Smith* v. *Mann*, 1 Wils. 220.

plaintiff must prove the defendant in possession; and I think that that case was properly decided. Then it was urged that two cases have been since determined at *nisi prius* the other way: but they were only decisions at *nisi prius*, where perhaps the subject was not so well considered, and they cannot outweigh the authority of the case in Wilson. Therefore on the convenience and reason of the thing, and considering the question in every point of view, I am of opinion that the plaintiff must prove the defendant in possession of that which he seeks to take from him, and that the contrary practice that has obtained is wrong.

ASHHURST, J.:

This is a point of such daily occurrence that it ought to be finally settled; and nothing can be more decisive than the case in Wilson, where it was determined that the plaintiff must prove the defendant in possession of the land to which he claims title. If the defendant have any land in the parish mentioned in the declaration in ejectment, he may suppose when he is served with the ejectment that the plaintiff intends to proceed for that; and if it turn out that the plaintiff sues for other lands it is hard that he should be answerable for the costs of the ejectment when he is not in fault.

GROSE, J.:

The question in this case is whether we are not to understand the rule of this Court to be substantially the same as that made in the Common Pleas, though they differ in words. It is admitted that according to the rule of the Common Pleas the plaintiff is bound to prove the defendant in possession: then it would be extraordinary that in a fictitious proceeding, invented for the purpose of trying titles, there should be different rules in the different courts. But I think that the rules of both the Courts are in substance the same; and the rule made in 1663 satisfies me that that rule was the rule of this Court formerly; by that rule the defendant confesses lease, entry, and ouster of such premises as are in his possession: and when I went the Western Circuit the practice was for the plaintiff to prove the defendant in possession of the premises that he claims. Nor is there any hard-

GOODRIGHT v. RICH. [*335]

ship in requiring proof of that which the plaintiff is supposed to have *already sworn; for he swears that he has served the declaration on the tenant of the premises in possession. I therefore think that the meaning of the rules in both the courts is the same, and the decision in Wilson fortifies me in that opinion.

LAWRENCE, J.:

It is highly convenient that the practice in both the courts on this subject should be the same. The rule of this Court is indeed inaccurately drawn; the defendant confesses lease, entry, and ouster, without saying of what, and that leaves it open to us to put the same construction on our rule as on that in the Common Pleas. The declaration in ejectment describes nothing with certainty; the defendant is called upon to defend generally: he knowing that he has some premises answering to that general description, defends and enters into the common consent rule, but at the trial he is turned round and is told that the plaintiff seeks to recover something not in his possession, and yet according to the plaintiff's argument he is to pay the costs of the ejectment: but that is surely not consistent with justice. Then this case was compared to the case of *liberum tenementum;* but as far as that applies, it is against the plaintiff; for notwithstanding the case in Dyer,† according to the modern practice, if the defendant plead *liberum tenementum*, the plaintiff is driven to a new assignment, in which he must specify the close, otherwise if the defendant prove his title to any land falling within the general description mentioned in the declaration it is sufficient; therefore by analogy to the case in trespass, the verdict ought to be for the defendant.

Per CURIAM: *Judgment of nonsuit.*

† Dy. 23 *b*, pl. 147.

VENABLES AND ELIZABETH HIS WIFE *v.* R. MORRIS AND EDWARDS.

1797. *June 27.*

(7 T. R. 342—348; 438.)

[342]

In considering whether an estate created by appointment and limited to commence *in futuro* is invalid for that reason, the estate is to be considered as if inserted in the original deed by which the power was created.

Qu., whether the estate given to trustees to preserve contingent remainders can be cut down to an estate *pur autre vie* according to the presumed intent.

THE LORD CHANCELLOR sent the following Case for the opinion of the Judges of this Court.

By indenture dated 15th August, 1767, and made between S. Morris and Hannah his wife of the one part, and R. Lloyd and R. Edwards of the other part, after reciting articles of agreement made prior to and in contemplation of the marriage then lately had between S. Morris and H. his wife, of certain lands and hereditaments, the estate and inheritance of the wife, and that it was agreed that in pursuance of the articles a settlement should be made of the said hereditaments and premises after the death of the wife's mother in reversion, as therein mentioned, it was witnessed that in pursuance of the articles and agreement, S. Morris covenanted with Lloyd and Edwards, their heirs and assigns, that he (S. M.) and his wife, would at or before the end of the next great sessions for the county of Montgomery, acknowledge a fine *sur conusance de droit come ceo*, &c. to Lloyd and Edwards and their heirs of the several undivided parts of lands therein mentioned (being the lands in question): and it was thereby agreed that the fine should enure to the use of S. Morris for life without impeachment of waste, remainder to the use of said Lloyd and Edwards and their heirs for the life of S. Morris in trust to support contingent remainders, remainder to the use of Hannah Morris for life without impeachment of waste, remainder to the use of Lloyd and Edwards and their heirs generally in fee in trust to *support the contingent uses and estates thereof thereinafter limited from being defeated or destroyed, and

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for that purpose to make entries and bring actions as occasion should require, but nevertheless to permit Hannah and her assigns to receive the rents, &c.; and after the several deceases of S. Morris and his wife to the use of the first and other sons of the marriage severally and successively in tail, remainder to the use of the first and other daughters successively in tail, remainder to the use of the said Hannah and the heirs of her body lawfully issuing; and for default of such issue to the use of such person or persons and to and for such uses, estates, intents and purposes as Hannah should at any time thereafter notwithstanding her coverture by any deed or deeds or by will duly executed, limit or appoint: and in default of such limitation or appointment, to the use of the right heirs of Hannah for ever. A fine was accordingly levied by S. Morris and his wife. Hannah Morris by a deed-poll bearing date 2nd September, 1767, properly executed, reciting the indenture of the 15th August, 1767, and the fine so levied, and that she was desirous to limit the reversion of the said hereditaments and premises in default of any issue of her body, did by virtue of the said power vested in her, limit and appoint all and singular the said premises in default of any issue of her body begotten or to be begotten, (subject nevertheless as is therein before mentioned) to the use of such person or persons and to and for such uses, intents, and purposes as she should at any time thereafter by her last will in writing, duly executed, direct, limit, and appoint; and for want of such direction, &c., to the use of the right heirs of S. Morris for ever. Hannah Morris died in November, 1770, without leaving any child or issue, and without having made any will or other appointment, save as before mentioned, and leaving the plaintiff Elizabeth Venables her sister and heir at law. S. Morris died in February, 1793, intestate, leaving the defendant R. Morris his brother and heir at law.

The questions submitted to this Court were; 1st, Whether upon the death of S. Morris, R. Morris became entitled to any and what interest in the premises in question? 2nd, Whether upon the death of S. Morris, Elizabeth Venables became entitled to any and what interest in the premises in question?

Barrow for the plaintiff contended that the plaintiff Elizabeth Venables as the heir at law of Hannah Morris was entitled; and that the appointment executed by the latter under the power reserved to her was invalid. First, the limitation to the heirs of *S. Morris under the deed of appointment, as unconnected with his estate for life under the settlement of August, 1767, and the subsequent fine, is "on default of any issue of the body of Hannah Morris, begotten or to be begotten;" which tends to a perpetuity, and is therefore too remote; being in effect to give a vested interest after an indefinite failure of issue. *Swain* v. *Deakin*, Dom. Proc. 1728, cited in *Jones* v. *Morgan*, 7 Bro. P. C. 162; *Lady Lanesborough* v. *Fox*, Cas. Temp. Talbot, 262, 4 Bro. P. C. 96, S. C.; *Moor* v. *Parker*, 4 Mod. 316, 1 Ld. Raym. 37; *Goodman* v. *Goodright*, 2 Burr. 873, and note to *Doe* v. *Fonnereau*, Dougl. 508, 3rd edit., 1 Blac. Rep. 188, S. C.; *Goodright* v. *Cornish*, Salk. 226, 1 Ld. Ray. 3, and 4 Mod. 256 S. C.; † which three last-mentioned cases also shew that the estate of S. Morris cannot be enlarged by the subsequent limitation to his heirs against the express words of the party limiting the same. Secondly, the limitation to the heirs of S. Morris after failure of H. Morris's issue, unconnected with the estate before granted to him by the former deed, is void, there being no precedent estate to support it. (Lord KENYON mentioned the case of *Harris* v. *Barnes*, 4 Burr. 2157, where this sort of question was much considered; and where it was holden that a devise to the heirs of a man's body might take effect as an executory devise, and the freehold in the mean time descended to the heir at law.) Admitting that the same limitation which would operate as an executory devise in a will may in general take effect as a springing use in the construction of a deed, still it must depend on the preceding estates created: and a separate grant of an estate to a man's heirs in his lifetime cannot take effect, according to the rule *nemo est hæres viventis*. At any rate such a limitation after an indefinite failure of issue ‡ would be too remote to operate either as an executory devise or as a springing use. Thirdly, the limitation to S. Morris by the settlement, and the limitation

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† Vid. *Habergham* v. *Vincent*, 5 T. R. 92.

‡ Vid. *Doe* v. *Fonnereau*, Dougl. 508.

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to his heirs by the appointment, cannot unite, according to the rule in *Shelley's* case, 1 Co. 93 b, 104 a, 106 b. 1st, because they are in separate instruments. *Moor* v. *Parker*, 4 Mod. 316, 1 Ld. Ray. 37; *Doe* v. *Fonnereau*, Dougl. 508; *Habergham* v. *Vincent*, 5 Term Rep. 92. 2ndly, because the limitation to the heirs was to take effect, if at all, by way of springing use, and not as a remainder after the determination of a *precedent estate: *Lloyd* v. *Carew*, Prec. in Chan. 72, Show. C. P. 137. 1 Fearne's Cont. Rem. 415, 416. 3rdly, because the rule in *Shelley's* case is contrary to the intent, and being founded merely on the system of feudal tenures is applicable to those cases only in which an inheritable quality is to be communicated to the estate for life first given, when the disposing party does in one and the same transaction look to the ancestor as the stock from whence the heirs are to proceed. 4thly, because the estate to S. Morris for life was a legal estate, and the appointment to his heirs conveyed only an equitable estate, inasmuch as the intervening limitation to trustees and their heirs after the life estate to Hannah Morris, is a subsisting estate in fee in those trustees; and therefore all the subsequent uses are uses upon uses, and trusts not executed by the statute. And it is settled that the rule in *Shelley's* case does not extend to unite estates of different qualities, as in this case an equitable limitation to the heirs with a legal estate for life in the ancestor. *Lady Jones* v. *Lord Say & Sele*, 2 Bro. P. C. 348, 8 Vin. Abr. 262; *Tippin* v. *Cosin*, 1 Ld. Raym. 33.

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Benyon, for the defendants, contended that on the death of S. Morris the defendant, R. Morris who was his heir-at-law, became entitled to the premises in fee under the appointment of H. Morris either by descent, if according to the rule in *Shelley's* case, the estate limited under the execution of the power to the heirs of S. Morris, could unite with, and enlarge the precedent estate for life which he took by the settlement, or by purchase, if no such union could take place, considering the words "heirs of S. Morris" as a designation of the person who was to take after all the preceding estates were expended. The two first objections depend on the third; for if the limitation under the

power of appointment can unite with the antecedent estates carved out of the inheritance by the deed of August, 1767, and the subsequent fine, the two first objections will fall to the ground together with the third. Now it is a general rule that an appointment in pursuance of a power created by a former deed, when executed, is to be taken as if it were inserted in the original deed, and is supplementary to it. Sir *Edward Clere's* case, 6 Co. 18;† in which case the appointment of the ultimate remainder to the heirs of S. Morris by the deed-poll of the 2nd September, 1767, must have the same construction *as if the limitation had been inserted in the antecedent deed; and then according to *Shelley's* case this would operate to an estate in fee to S. Morris, from whom the defendant R. Morris would then claim by descent. But then it was objected that the limitation to the heirs, being in default of issue of H. Morris indefinitely, is too remote to take effect. But that has no foundation; for it appears that estates tail were before limited successively to all the issue both sons and daughters of H. Morris, and therefore the ultimate remainder could never vest in possession so long as any of her descendants were living. The words therefore "in default of any issue of her body" are tautologous and superfluous, and mean no more than what was before expressly declared; and the limitations will in substance stand thus; an estate for life is given to the husband, remainder to the wife for life, remainder to the first and other sons successively in tail, remainder in like manner to their daughters, remainder to the wife in tail, remainder to the heirs of the husband: which amounts to no more than the common case of a remainder over after an estate-tail. The distinction was expressly taken in *Badger* v. *Lloyd*, 1 Ld. Ray. 523, 1 Salk. 232, S. C. where the Court agreed, that if a man seised in fee devise lands to A. if J. S. a stranger die without issue, this is too remote to take effect; because by these means the estate may be tied up for a longer period than the law allows; for so long as J. S. had issue, the estate would be unalienable: but according to the same case, if a man seised of a reversion after an estate tail,

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† Vid. *Robinson* v. *Hardcastle*, 2 T. R. 241, 1 R. R. 467; and *Doe* v. *Whitehead*, 2 Burn. 710.

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devise the lands to another after failure of issue of the tenant in tail, it is an immediate devise of the reversion expectant on the determination of the estate-tail, and therefore good; for there the same reason does not hold. It must be admitted that at common law, a simple grant to the heirs of a person living is void; but such limitation may under circumstances, be good, either as an executory devise, or as a springing use. Here the remainder was not created by the deed of appointment, but existed before under the settlement: and the deed of appointment only desginated the person who was to take after the failure of all the preceding estates, and consequently after the death of S. Morris, at which time it must be certain who was his heir. In Cro. Car. 102, a remainder to the survivor of two persons was holden good though during their joint lives, it could not be ascertained which of them would take. If therefore *the rule in *Shelley's* case apply to this, R. Morris will take by descent; if not, he will take as a purchaser under the description of heir of S. Morris after his death. But then it is objected that this being an equitable remainder, it cannot unite with an antecedent legal estate for life. Supposing that to be so, and that this Court could not regard the trust, the only effect would be to send this case back to the Court of Chancery to be new modelled. But this is not an equitable remainder; for the Court will look to the intention of the parties to the deed of August, 1767; and they will see that the intention of interposing the estate to the trustees after the estate for life to H. Morris, was merely to preserve contingent remainders during her life: and therefore they will so construe the limitation to the trustees as if those words were added. As in *Coriton* v. *Hellier* cited in 2 Ves. 195; † where the LORD CHANCELLOR, on the devise of a term of ninety-nine years supplied the words "if he so long live," in order to effectuate the intent.

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LORD KENYON, Ch. J.:

I should find some difficulty in deciding that the subsequent limitations are estates executed. In the case cited by the defendant's counsel, Lord HARDWICKE supplied the words from

† Vid. Fearne's Cont. Rem. 495, last (sc. 4th) edition.

necessity, but that is not like this case: however I wish to answer the case sent to us from the LORD CHANCELLOR, without noticing this point.

Several topics have been stated at the bar, of which no doubt can now be entertained. Ever since the case of *Jones* v. *Lord Say & Sele* † it has been considered, and perhaps there was no doubt of it before, that a legal estate in the ancestor and an equitable estate to the issue could not be united so as to increase the estate in the ancestor. But the present case is different from all those that have been cited: that which comes nearest to the present is the case of *Habergham* v. *Vincent* but that is distinguishable from this, for there the will was wholly ineffective at first, the power created by the will could not operate at all at the time when it was made. But the defendant's counsel has accurately stated the ground on which this case ought to be decided, namely, that an appointment when executed is to be considered in the same light as if it had been inserted in the original deed in which the power of appointment was created. Then let us see what would have been the case here if this appointment had been inserted in the deed creating the power. An estate was limited to S. Morris for life, and after *several [*348] intermediate limitations an estate was limited to his heirs for ever; and whether the last be a legal or an equitable estate, makes no other difference than this, that in the one case the heir will take as a purchaser in the other by descent; but *quâcunque viâ datâ* the defendant is entitled in this case. For if the limitation to the heir of S. Morris be a legal estate, it enlarged the estate in the ancestor and gave him a fee; if it be an equitable remainder to which the prior legal estate in the ancestor could not be united, it was a contingent remainder to the heir, and the heir takes as a purchaser; and the prior estate in the trustees if they took such an estate, or in the father would support this remainder, and the instant the prior estate was determined, this contingent remainder was ready to take effect. Therefore the heir of S. Morris is now entitled to take, and it is immaterial whether he takes as a purchaser or by descent.

† 1 Eq. Cas. Abr. 383, pl. 4; 3 Bro. P. C. 458

VENABLES v. MORRIS.

The following certificate was sent by the Court to the LORD CHANCELLOR, in this case:

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"We are of opinion that the estate limited to Robert Lloyd and Rowland Edwards, on the determination of the life of Hannah Morris, was an use executed in them in fee; and that the appointment made by her did not create any estate which could unite with the life estate of Sampson Morris, and that it could only give an equitable estate to the person who at his death should answer the description of his right heir. And we are of opinion that neither Randal Morris nor Elizabeth Venables took any legal interest in the premises in question.

"Nov. 8th, 1797.

"KENYON,
"W. H. ASHHURST,
"N. GROSE,
"S. LAWRENCE."

1797. *June* 30.

GEORGE *v.* CLAGETT, AND ANOTHER.

(7 T. R. 359—361.)

[359]

If a factor, who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

ON the trial of this action, which was assumpsit for goods sold and delivered to the amount of 142*l.* 1*s.* 9*d.*, before Lord Kenyon, at the Guildhall Sittings, the case appeared to be this. The plaintiff a clothier at Frome employed Messrs. Rich & Heapy in London, Blackwell-hall factors, as his factors under a commision *del credere*, who besides acting as factors bought and sold great quantities of woollen cloths on their own account, all their business being carried on at one warehouse. The factors sold at twelve months credit, and were allowed two and a half per cent. On the 30th of September, 1795, Delvalle, a tobacco broker, and who had been in habit of dealing with the defendants, bought

[*360] several parcels of tobacco of them and gave them in payment *a bill of exchange for 1,198*l.* 16*s.* drawn by one Fisher on Rich & Heapy, on the 24th of September, 1795, payable two months after date to J. Stafford, who indorsed to Delvalle, who indorsed

it over to the defendants, it having been previously accepted by Rich & Heapy. On the 12th of October, 1795, the defendants bought a quantity of woollen cloths for exportation of Rich & Heapy, amounting to 1,237*l.* 18*s.* 3*d.* at twelve months credit; the goods were taken out of one general mass in Rich & Heapy's warehouse; Rich & Heapy made out a bill of parcels for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff. Early in November, 1795, Rich & Heapy became bankrupts; and afterwards, on the 20th of the same month, the plaintiff gave the defendants notice not to pay Rich & Heapy for certain cloths specified, part of the above, amounting to 142*l.* 1*s.* 9*d.*, they having been his property, and having been sold on his account by Rich & Heapy on commission. The question was whether the defendants were or were not entitled to set off their demand against Rich & Heapy on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord KENYON was of opinion that they were, as well on principle as on the authority of *Rabone* v. *Williams*;* and a verdict was accordingly found for the defendants.

A rule having been obtained, calling on the defendants to shew cause why the verdict should not be set aside, and a new trial had, on the authority of the case of *Estcott* v. *Milward*, Co. Bank. Laws, 236.

* *Rabone, jun.* v. *Williams*, Midx. Sittings after Mich. 1785; which was thus stated.—Action for the value of goods sold to the defendant by means of the house of Rabone, sen. & Co. at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from Rabone & Co., the factors, upon another account alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by Rabone & Co., the factors, and not by the plaintiff. Lord MANSFIELD, Ch. J.—"Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled."—Upon this opinion the rest, being a mere matter of account, was referred. In *Bayley* v. *Morley*, London Sittings after Mich. 1788, Lord KENYON recognised the law of this case.

GEORGE v. CLAGETT.

Gibbs and *Giles* were now to have shewn cause against that rule: but

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Erskine and *Walton* were called upon to support it. They relied on the cases of *Scrimeshire* v. *Alderton*,* and *Estcott* v. *Milward* as reported in Co. Bank. Laws, to shew that under the circumstances of this case the principal might resort to the buyer at once, he having given notice before actual payment by the defendants to the factors.

But a more accurate note of the case of *Estcott* v. *Milward* † having now been obtained from Mr. J. BULLER before whom that cause was tried, and read,

The COURT were clearly of opinion that the directions given by the learned judge on the trial of this cause were right; and that this case was not distinguishable from that of *Rabone* v. *Williams*. Therefore they

Discharged the rule.

Note.—The rule laid down in this case is treated as well established in the observations of WILLES, J. in *Turner* v. *Thomas* (1871) L. R. 6 C. P. 610; see also *Ex parte Dixon, In re Henley* (1869) L. R. 4 Ch. 133; *Thackrah* v. *Ferguson* (1877) 25 W. R. 307. The case is different where the agent is employed as a broker properly so called; *Baring* v. *Corrie*, 2 B. & Ald. 137. The principle of the above cases, *George* v. *Clagett*, and *Rabone* v. *Williams*, is applied as between the ultimate principal and a sub-agent employed by the factor with the knowledge and allowance of the principal, in *New Zealand &c. Co.* v. *Watson* (1881) 7 Q. B. D. 374, 50 L. J. Q. B. 433, reversing 5 Q. B. D. 474.—R. C.

* 2 Str. 1182.

† London Sittings after Mich. 1783. Action for goods sold. The goods were sold by Farrar, a corn factor, who gave no account of the sale to the plaintiff, nor made any entry of it in his books. He was insolvent for some time before, and avoided all dealing for a month, had desired that there might be no buying in his name, and had not dealt with the defendant for a year before, but was then in his debt. There was a verdict for the plaintiff on the ground of fraud.

PATCHETT *v.* BANCROFT AND OTHERS.

(7 T. R. 367—370.)

1797. *July* 3.

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One warrant of distress for the amount of several duties imposed by different Acts of Parliament, each giving a power of distress, is legal. The judgment of the commissioners of land-tax on appeal is conclusive in an action of trespass brought against the officer for levying under a warrant of distress.†

IN trespass for taking the plaintiff's cattle, tried at York before Rooke, J., it appeared that the cattle were taken under a warrant of distress for the aggregate amount of several taxes,‡ one of which was the land-tax on some woods, which the plaintiff at *the time of the distress made refused to pay, though he was ready and offered to pay the rest if the defendants would have taken them only. The ground of the plaintiff's objection to pay that particular assessment was because it was to raise a sum for the use of the parish over and above the proportion of the land-tax for that parish payable to government; and he appealed to the commissioners appointed under the Act of Parliament, who upon hearing the parties confirmed the assessment for the whole. The learned Judge thought that, as the objectionable tax had been confirmed on the appeal, it could not now be questioned in this action; and that it was sufficient for the defendants to shew a general right to distrain; and therefore he nonsuited the plaintiff, with liberty to move to set aside the nonsuit, and enter a verdict for him for 24*l.* if this Court should be of opinion that the action was well founded. Accordingly a rule nisi was obtained for that purpose in Easter Term last, on the ground that there should have been a separate warrant for each tax; and that a distress under one warrant for the amount of all the taxes was illegal; for which were cited *Rogers* v. *Birkmire*,§ *Clark* v. *Lucas*,‖ and *Stephens* v. *Houghton*.¶

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† So held by a Divisional Court (Pollock, B. and Hawkins, J.) on the authority of this case, in *Simpkin* v. *Robinson* (1881) 45 L. T. 221.—R. C.

‡ *Viz.* the land tax, wood tax, commutation tax, window duty, house duty, horse duty, servants' tax, &c.

§ 2 Stra. 1040, and Rep. Temp. Hardw. 245.

‖ Cited *ibid.*

¶ 1 Barnard. 128, 214.

PATCHETT v. BANCROFT.

Cockell, Serjt., *Chambre*, and *Raine*, shewed cause; [and cited *Hutchins* v. *Chambers*,* 1 Burr. 580. *Law*, *Wood*, and *Ainslie* having been heard on the other side,]

[370] The COURT took time to consider of their opinion, which was now delivered by

LORD KENYON, Ch. J.:

As all the taxes were confirmed on appeal, however improper perhaps the one objected to was, it must be binding on the parties; and then the warrant of distress, though it included them all, was properly issued. The consequence of which is that the rule for a new trial must be discharged, and the nonsuit stand.

Rule discharged.

1797. *July* 5.

THE KING *v.* THE INHABITANTS OF SETON.

(7 T. R. 373—374.)

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The Court quashed a certiorari, which was issued before, but not served until after, judgment on an indictment for a misdemeanor. After judgment, the record can only be removed by a writ of error.†

THE defendants, the inhabitants of the township of Seton, were indicted for not repairing a road; and after verdict and judgment at the Quarter Sessions, a certiorari was served to remove the record here.

Chambre on a former day in this Term moved to quash the *certiorari quia improvidè emanavit*, observing that the party who now wished to remove the record could only do so by writ of error.

Law now shewed cause against that rule, and insisted that all the proceedings below were stayed by the issuing of the certiorari, which was before verdict in this case. In 2 Ld.

* See also *Durrant* v. *Boys*, 3 R. R. 268.

† So held in *Nally* v. *The Queen* (1884) 16 L. R. Ir. 1.—R. C.

Raym. 1305, POWELL, J. said "A writ of certiorari removes any order or conviction, though they be made or taken before the *testè* of the writ, so they be taken before the return;" and in that case the inquisition taken after the *testè*, but before the return of the certiorari, was quashed by this Court for defects appearing on the inquisition.

LORD KENYON, Ch. J.:

In the case of summary proceedings, orders, and convictions before magistrates, the proceedings may be removed by certiorari after judgment, because such proceedings can only be removed by certiorari: but where a judgment has been given on an indictment, the record must be removed by *writ of error. [*374] If any fraud or misconduct had been imputed to the magistrates in proceeding notwithstanding the issuing of the certiorari, that might have been a ground for a criminal proceeding against them; and I believe there are instances in which a criminal information has been granted against magistrates acting in sessions. In this case if the party, who sued out the certiorari, wish to object to the proceedings, he must remove the record by writ of error; but this writ must be quashed.

Per CURIAM:

Rule absolute.

K. B. MICHAELMAS TERM.

COOK *v.* JENNINGS.

(7 T. R. 381—385.)

1797
Nov. 15.

[381]

Under a charter-party of affreightment, in which the defendant covenanted to pay so much for freight for "goods delivered at A." freight cannot be recovered *pro ratâ itineris* if the ship be wrecked at B. before her arrival at A. If it be alleged that the defendant accepted his goods at B. this might be evidence of a new contract, under which there would be a good ground of action, but this could not be set up in an action of covenant on the charter-party.*

THIS was an action of covenant on a charter-party of affreightment, dated 2nd of August, 1796, by which the plaintiff let the ship *The Resolution* to the defendant to freight from Liverpool to Wyburgh and back to Liverpool, and agreed that the master should take on board a cargo of salt to Wyburgh, and after delivering the same there, should take on board there a cargo of deals, in consideration of which the defendant agreed to pay to the plaintiff in full for the freight and "hire of the ship for the said voyage at and after the rate of 7*l.* per standard hundred for deals delivered at Liverpool, &c.; the freight to be paid one fourth in cash on her arrival and the remainder by an acceptance on London at four months date." The declaration after setting forth the charter-party stated that after carrying the cargo of salt to Wyburgh, took on board there a cargo of deals, &c., and proceeded on her voyage for and towards Liverpool, &c. and whilst the ship was so proceeding, &c. and after she had performed a great part of her voyage, but before her arrival at Liverpool, on, &c. the ship was by the force and violence of the winds and waves, &c. wrecked and cast upon the shore and thereby became incapable of proceeding any farther on the voyage, by reason whereof the cargo of deals was obliged to put on shore for the preservation

* This case is referred to by COCKBURN, C. J. in his judgment in *Metcalfe* v. *Britannia Ironworks Co.* (1876) 1 Q. B. D. 613, 621, a case in which the Court differed in opinion as to whether, on the presumption of fact arising in the case, there was a new agreement to pay freight *pro ratâ*. The decision was affirmed in the C. A., 2 Q. B. Div. 423, 46 L. J. Q. B. 443.—R. C.

thereof; "which said cargo so unladen, the defendant on, *&c. accepted and received into his hands and possession, and then and there sold and disposed of the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the said freight and hire of the ship for the carriage of the said cargo of deals, for such part of the voyage from Wyburgh to Liverpool as the ship performed," &c.; with an averment that a proportionable part amounted to the sum of 800*l*. And the breach assigned was in the non-payment of that sum.

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The defendant pleaded that no part of the cargo of deals was delivered at Liverpool according to the form and effect of the said charter-party.

To this plea there was a special demurrer, assigning these causes, that the defendant had not by his plea confessed and avoided or denied the matter alleged in the declaration, or sufficiently answered the same, but attempted to put in issue collateral matters immaterial to the defence of the action; and that no material issue could be taken upon the plea.

Wood, in support of the demurrer, [cited *Luke* v. *Lyde*, 2 Burr. 882, and 1 Bl. Rep. 190. He argued that the freighter was in conscience bound to pay *pro ratâ*; and that he had assented to the delivery at the place where the ship was wrecked by his acceptance of the goods there.]

Garrow, *contrà*:

The delivery of the cargo at Liverpool was a condition precedent to the plaintiff's right to recover any part of the freight, the defendant having expressly engaged to pay only in one event that has not happened, the safe delivery of the goods *at Liverpool. * * A contract under seal cannot be waived by a parol agreement, *Littler* v. *Holland*, 3 T. R. 590.

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Wood, in reply:

[A sufficient reason, namely the act of God, is shewn why the whole voyage could not be performed. The defendant, by his acceptance of the goods has agreed to pay a proportionable part, and this not on the ground of a parol waiver of a contract

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under seal, (and therefore the case of *Littler* v. *Holland* does not apply,) but by the operation of law on a contract so framed.]

LORD KENYON, Ch. J.:

We are called upon to decide in this action according to the rules of law on a contract between these parties, which was made in the most solemn matter, by a deed under seal; though indeed I do not know that it would have made any difference if the question had arisen on a precise formal contract not

[*384] under seal. By the terms of this agreement the *defendant engaged to pay so much on delivery of the goods at Liverpool, "one-fourth in cash on her arrival, and the remainder by an acceptance at four months:" but the goods never arrived: then at what time were those bills to be dated? We do not sit here to make, but to enforce, contracts; and the question put to us is, whether the freight is to be paid under this contract, though the ship never arrived, but was lost before her arrival at Liverpool? upon which I cannot bring my mind to doubt. The case of *Luke* v. *Lyde* is very distinguishable from the present, that being the case of a general assumpsit for the freight of goods, in which Lord MANSFIELD states the marine law on this subject. But what has the case of an implied contract to do with an express contract? Lord Coke says *expressum facit cessare tacitum*. Here the parties are bound by a precise agreement. Then it is suggested that we ought not to give effect to this contract because it is unreasonable: but we are to decide according to the contract of the parties; and the law says, that if A. covenant to enfeoff B., A. is not released from his covenant though B. will not accept livery of seisin, unless that act be frustated by the act of the covenantee. It is not necessary now to determine whether or not the plaintiff might not have brought an action of assumpsit; it will be time enough to decide that case whenever the question arises. But here the question is whether or not he can enforce payment of the money under this contract, not having carried the goods to Liverpool, and the defendant having only undertaken to pay on their delivery at Liverpool; in answer to this action the defendant has a right to say *non hæc in fœdera veni*.

ASHHURST, J.:

Though the objection made by the defendant is a technical one and does not meet the justice of the case, we are bound to pronounce judgment on the contract that the parties have made. And I think that the defendant is not bound to pay the freight under this agreement, the event on the happening of which the money was to become due, never having taken place.

GROSE, J.:

This being an action of covenant it is necessary for the plaintiff to shew that he is entitled by the defendant's covenant to that which he seeks. Now it is to be observed that the defendant only covenanted to pay so much per hundred "for deals delivered at Liverpool;" and unless the goods were delivered there the defendant did not undertake to pay any thing. But it is admitted on the record that the deals never were delivered at Liverpool, *and therefore the case does not come within the [*385] covenant. I had seen the case of *Luke* v. *Lyde* before I came into court, but could not ascertain from the report of it what was the form of the action: it is now admitted that that was assumpsit generally; and though there is no difference in the construction of a contract whether it be or be not by deed, provided the terms are precisely and exactly defined, yet that case is not in point, because it was on an implied assumpsit, where much is frequently implied in order to arrive at the justice of the case. But there is a case in point in 1 Brownl. 21, *Bright* v. *Cowper*. It was "an action of covenant on a covenant made by the merchant with the master of a ship, that if he would bring his freight to such a port, then he would pay him such a sum, and shews that part of the goods was taken away by pirates, and that the residue of the goods was brought to the place appointed and there unladen, and that the merchant had not paid, and so the covenant broken; and the question was, whether the merchant should pay the money agreed for, since all the merchandizes were not brought to the place appointed, and the Court was of opinion that he ought not to pay the money because the agreement was not by him performed." Now that is a direct authority against the plaintiff in this case.

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LAWRENCE J:

I agree with the plaintiff's counsel, that whether the contract be by parol or under seal the operation of the law on it is equally the same. When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight: but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro ratâ* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties: but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action.

Judgment for the defendant.

1797. *Nov.* 17.

[391]

WEBB *v.* FOX AND ANOTHER.†

(7 T. R. 391—399.)

An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy against all the world but his assignees, and may maintain trover for them against a stranger.

To trover for goods, namely, 300 yards of quilting, the defendants pleaded, first, not guilty, on which issue was joined; and secondly the bankruptcy of the plaintiff before the time of

[*392] *the conversion stated in the declaration, setting forth particularly the trading, petitioning creditor's debt, bankruptcy, commission, and the assignment of all the plaintiff's effects to the assignees, &c.

The plaintiff replied that after the assignment, he "became and was lawfully possessed of the said goods, &c. and was and continued so possessed thereof without any claim, interruption, molestation or denial of the said T. R. &c." (the assignees) until the defendants took the said goods, &c.

† *Herbert* v. *Sayer* (1844) 5 Q. B. 965, 979; *Jameson* v. *Brick & Stone Co.* (C. A. 1878) 4 Q. B. D. 208, 48 L. J. Q. B. 249.—R. C.

The defendants rejoined that the plaintiff had not obtained his certificate. WEBB v. FOX.

To this rejoinder there was a general demurrer.

This case was twice argued, in Trinity Term last by *Best* for the plaintiff, and *Dampier* for the defendants, and now by *Erskine* for the former, and *Gibbs* for the latter.

Arguments for the plaintiff:

A person having a special property in goods may maintain trover for them; an uncertificated bankrupt is capable of having special property; and it appears on this record that the plaintiff has such a property in the goods in question. * * *

Arguments for the defendants: [393]

The action of trover is founded on property either general or special; the right of property may be such as carries with it the right of possession. There is no pretence to say in this case that the general property is in the plaintiff; it is vested in his assignees. Therefore if the plaintiff can recover at all, it must be on a supposed analogy between this case and the cases of special property, but no person can have a special property in any thing but with the consent of the true owner. If the plaintiff had had the actual possession of these goods, no one but the assignees could have claimed it: but he had parted with the possession, and the defendants, in whose possession the goods are, are answerable to the assignees. That an uncertificated bankrupt cannot have any property of his own is proved by the three statutes, 1 Jac. I. c. 15, s. 14; 21 Jac. I. c. 19, s. 14; and 19 Geo. II. c. 32, s. 1, that protect payments made by and to bankrupts after an act of bankruptcy in certain instances, and by the cases *Ex parte Proudfoot*,* *Martin* v. *O'Hara*,† *Billon* v. *Hyde*,‡ *Hitchen* v. *Campbell*,§ and *Evans* v. *Mann*; ‖ in the first of which it was said by Lord HARDWICKE that the future personal estate of the bankrupt is vested in the assignees, and in the others it was holden that payments and a

* 1 Atk. 252.
† Cowp. 824.
‡ 1 Ves. 326.
§ 2 Bl. Rep. 827.
‖ Cop. 569.

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sale by a bankrupt after the bankruptcy could not be supported, because those cases did not come within either of these three statutes. And in *Webb* v. *Ward*,† where an uncertificated bankrupt was required to *give security for the costs in an action of trover brought by him, Lord KENYON recognised the general principle that "an uncertificated bankrupt cannot have any property of his own." * * *

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In reply, it was said that it was not necessary for the plaintiff in his replication to shew that this was one of the excepted cases; but that if the principle, for which the defendants contended, were well founded, the plea itself should have negatived those exceptions; and that the plea could not be supported on account of that omission.

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LORD KENYON, Ch. J.:

I cannot commend the mode on which this question is brought before the Court, since the whole merits of the case might have been gone into on the general issue; whereas here the defendants have, in addition to the plea of not guilty, pleaded a special plea, which would have been bad on a special demurrer, and which will be attended with additional expense to the parties.

I will deliver this case in the outset from one of the arguments urged on the part of the defendants. I admit in general the propriety of arguing by analogy to cases of real property: but this case can never be compared to cases respecting real property, unless it can be shewn that a special property may be recovered in ejectment, while the absolute legal property remains in some other person. The immediate right to real property must be vested in one person only; whereas a special property in the case of personalty, may be in one, as in the instance of carriers, while the absolute right to it may exist in another. When a competition arises between those two persons the right of the latter must prevail: but as against all other persons a special property is sufficient. Now here it seems to be admitted that an uncertificated bankrupt may go to market with goods in his possession, and transfer the property to any other person; then

† 7 T. R. 296.

he must have in some degree a special property in them against every one but his assignees. Let us see how this case appears on the pleadings; the plaintiff claims the goods in question, alleging that he was possessed of them as of his proper goods; the defendants in answer, say that they cannot be the goods of the plaintiff, because he (the plaintiff) was a bankrupt, and that all his effects had been assigned to the assignees under the commission; and as far as respected the property at the time of the bankruptcy, there is no doubt but that it all passed under the assignment: but the plaintiff replies that since his bankruptcy he has acquired these goods, and that he is now lawfully possessed of them. And why may he not be lawfully possessed of them, though acquired since *his bankruptcy? It is admitted [*397] that if they were the produce of his earnings and labour he may be. The plaintiff is possessed of these goods, and prima facie the possessor of personal property is the owner of them; that which the defendants stated in their plea, in answer to the plaintiff's claim, did not conclude the question, and the replication explains the whole. Therefore on principle, and without adverting to the authorities alluded to, I am of opinion that nobody has a right to take this property from the bankrupt, but those who regularly claim under the commission. With regard to the authorities; I certainly should not rely on the cases decided before me at *nisi prius*, but those cases have been since recognized in the late case in the Court of Common Pleas; and I subscribe to the opinion given by that Court, that the bankrupt has a right to these goods against the defendants who are wrong-doers. Convenience and sound policy also require a similar decision. If the plaintiff had brought an action of trespass instead of trover, his possession would have entitled him to recover against a wrong-doer; and the form of the action cannot alter the law. But, according to the defendant's argument, if the bankrupt gets possession of goods subsequent to his bankruptcy, it is an invitation to all the world to scramble for the possession of them, though the assignees do not choose to dispute the question with the bankrupt. Therefore on principle, on the authority of decided cases, and on the grounds of policy and convenience, I am of opinion that this action may be maintained.

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ASHHURST, J.:

It appears to me that the special plea is unnecessary, and that the rejoinder is frivolous. There was no occasion for this plea, since the whole case would have been open to the defendants on the general issue. To this plea however the plaintiff replied that he was lawfully possessed of these goods; against a wrong-doer it is not necessary to set out a title, a lawful possession is sufficient. In answer to this, the defendants say that the plaintiff was an uncertificated bankrupt: but what then? If the plaintiff were lawfully possessed of these goods, and the assignees do not contest the matter with him, a wrong-doer cannot retain the possession of them from him. I take the general rule to be that a bankrupt has a right against all persons but the assignees; here a lawful possession in him is admitted, and that is sufficient against wrong-doers.

GROSE, J.:

I have no objection to consider the question as raised by these
[*398] pleadings that the defendants wished to agitate, *namely, whether the plaintiff has such a property in these goods as will entitle him to maintain an action of trover for them? That leads us to consider the situation of an uncertificated bankrupt and that of his creditors, as to the goods of which the bankrupt is possessed subsequent to his bankruptcy. The creditors who have not received 20s. in the pound, are entitled to receive a satisfaction to that amount; but it must be through the medium of his assignees. But the creditors, who are not assignees, have no property in goods acquired by the bankrupt after his bankruptcy if they take them, they are trespassers. If such goods be stolen from the bankrupt, it may be alleged in an indictment for the felony that they were his property. If he sell them, he may receive the money for them; and if they be pawned by him, he may redeem them on tendering the money for which they were pledged. In the case of *Fowler* v. *Down*,† Mr. J. HEATH very accurately stated that an uncertificated bankrupt 'has a defeasible property, which none but the assignees can defeat.' And he compared his situation to that of an alien who may

† 1 Bos. & Pul. 44.

purchase lands and maintain an action for them if the Crown do not interpose. So here, he may maintain trover; and if he could not, all the inconveniences suggested by Lord KENYON, would probably ensue. Therefore as well on the authority of the case lately decided in the Court of Common Pleas as of the other cases cited, I think that this action is maintainable.

LAWRENCE, J.:

In order to maintain an action of trover, it is necessary that the plaintiff should have either the absolute or a special property in the goods that are the subject of the action; he need not have both; either the one or the other is sufficient. Absolute property is where one, having the possession of chattels, has also the exclusive right to enjoy them, and which can only be defeated by some act of his own. Special property is where he who has the possession, holds them subject to the claims of other persons. There may be special property in various instances. There may be special property without possession; or there may be special property, arising simply out of a lawful possession, and which ceases when the true owner appears. Such was the case of *Armory* v. *Delamirie*, 1 Str. 504, where a chimney-sweeper's boy, having found a jewel, carried it to a goldsmith to know what it was, who refused to return it; and it was holden that though the plaintiff did not by such finding acquire an absolute property, yet he had such a property as would enable him to keep it against all *but the rightful owner, and consequently that he might maintain trover for it against the goldsmith, who was a wrong doer. Now that appears to me to go the whole length of deciding this case. Here the plaintiff says that he was possessed of these goods, to which the defendants plead that the plaintiff is a bankrupt and that all his effects are vested in his assignees: and I cannot agree with the plaintiff's counsel that the plea should have gone farther, and shewn that this was not one of the cases in which a bankrupt may have property; the plea states generally that the property was out of the plaintiff. But for the same reason I think it was sufficient for the plaintiff in his replication, to shew a right to the goods, which he has done

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by alleging that he "became lawfully possessed of them since the bankruptcy, and that he has kept them without any claim, interruption, molestation, or denial of the assignees." I agree with the defendant's counsel that it is not sufficient to state in a declaration in trover that the plaintiff is possessed, without adding that the property of the goods is in him: but it was not necessary to repeat in this replication that the property was in the plaintiff, since the replication shews those circumstances, in answer to the plea, from which the law will infer a special property in him, such a property as enables him to maintain trover.

Judgment for the plaintiff.

1797. *Nov.* 20.

[421]

AGUILAR AND OTHERS *v.* RODGERS.

(7 T. R. 421—423.)

The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived;" held that the assured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured and the assured had been obliged to pay for salvage.

THIS was an action of *assumpsit* brought to recover a return of premium on a policy of insurance. The facts, which were all admitted, were shortly these. On the 20th of June, 1796, the defendant underwrote for 200*l.* a policy on the freight in the ship, called the *Jackson*, at and from Jamaica to London; warranted to sail on or before the 26th of July, 1796, with convoy for the voyage, at the rate of ten guineas per cent., to return 2*l.* per cent. "if she sailed on or before the 1st of July, 1796, and arrived." Afterwards by a memorandum indorsed on the policy, 15th of August, 1796, and signed by the defendant, it was agreed in consideration of ten guineas per cent. additional premium, that the warranty of sailing with convoy should be annulled, and the defendant undertook to return 10*l.* per cent. "if the ship sailed with convoy and arrived." The ship sailed from Jamaica on the 26th of July, with convoy, but separated in bad weather, and was captured on the 26th of October, by a French ship, recaptured by a King's ship on the 5th of November, and carried

into Cork, where she was delivered up to the owners on paying *9*l.* 14*s.* 7*d.* per cent. for salvage; and afterwards she arrived at the port of London with her cargo on board. The defendant paid into Court 19*l.* 9*s.* 2*d.*, the amount of the salvage on the 200*l.*

A verdict was taken for the plaintiffs; to set aside which a rule *nisi* was obtained on a former day. This case now came on to be argued by *Gibbs* and *Park* for the plaintiffs, and *Erskine* and *Giles* for the defendant.

For the plaintiffs it was contended that they were entitled to a return of the additional premium, inasmuch as the ship had sailed with convoy and had arrived in port.

The defendant insisted that the evident meaning of the parties, in making the memorandum, was that the additional premium should not be returned unless the ship arrived free from loss occasioned by the enemy. And to shew that a bare arrival would not alone be sufficient to entitle the plaintiffs to a return of the premium, they put the case of a ship being insured to a neutral port, and being taken by an enemy on her voyage and carried by the enemy into that very neutral port, in which case the ship would arrive at her port within the words, but (as they insisted) not within the meaning, of such a memorandum.

Both parties relied on the case of *Simond* v. *Boydell* † (where it was holden that the ship arrived within the meaning of a similar memorandum, though she had sustained a loss occasioned by a sea risk;) the plaintiffs on the determination itself, and the defendant on particular expressions used by Lord MANSFIELD in giving his opinion.

LORD KENYON, Ch. J.:

Although my opinion fluctuated during the course of the trial, for the case of *Simond* v. *Boydell* was not fully stated there, at last I formed an opinion favourable to the plaintiff's claim, which after reconsidering the case I see no reason to alter. I agree with the defendant's counsel that every arrival of the ship at her

† Dougl. 268.

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port of destination, would not be an arrival within the fair construction of this memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port, supposed by the defendant; or an arrival at her port in England as the property of other persons after a capture. But in order to satisfy the meaning of the memorandum it should be an "arrival at the destined port in the course of her voyage;" and in this case I think the ship did arrive at the port of London in the course of her voyage. It is now too late to controvert the *authority of [*423] *Hamilton* v. *Mendos*,† even if we were disposed so to do, which I am not, where it was holden that though the assured may abandon on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is eighteen years since the case of *Simond* v. *Boydell* was decided: that case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added after "arrived" "safely from the enemy," or some words to that effect. But the words here used are not equivocal: and we ought not to depart from them; it would be attended with great mischief and inconvenience if in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. Suppose this question had arisen on a contract under seal, and an action of covenant had been brought, assigning as a breach the non-arrival of the ship at the port of London, the answer that in fact the ship did arrive there in the course of her voyage would have been decisive. And if so, this memorandum must receive the same construction in this action. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict ought not to be set aside.

GROSE, J.‡ and LAWRENCE, J. expressed themselves of the same opinion.

Rule discharged.

† 2 Burr. 1198.

‡ Mr. J. Ashhurst was absent on this day and the remainder of the Term.

TAUNTON *v.* COSTAR.

(7 T. R. 431—432.)

1797. *Nov.* 21.

[431]

A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession.

In replevin for taking the plaintiff's cattle in a certain close called Aston's Eyott, the defendant avowed the taking under a demise of the *locus in quo* from the Warden and College of All-Souls, Oxford, who were seised in fee, to one Jackson for twenty years from the 1st January, 1788, and which Jackson demised to the defendant for a year from 21st December, 1788, and so from year to year as long as both parties pleased, by virtue of which the defendant entered and was possessed at the time when he distrained the plaintiff's cattle damage feasant. To this the plaintiff pleaded in bar, that before the demise to Costar Jackson made his will and appointed certain persons executors, and afterwards on the 20th March, 1795, died, whereby the said executors became entitled to the residue of the term, and that they sold and assigned the same to the plaintiff, who being possessed of and entitled to the same before the time when, &c., and six calendar months before *the 21st December, 1796, gave the defendant notice to quit, by force of which the demise to him determined; after which the plaintiff entered into the *locus in quo* and put his cattle therein, as he lawfully might for the cause aforesaid, &c. Replication by the defendant that he ought not to be barred, &c. because he did not quit or give up the possession of the said place in which, &c. to the plaintiff, or in any manner abandon the possession of the same, in pursuance of the notice to quit; but on the contrary continued to hold the possession thereof after the said 21st December until and at the said time when, &c., and from thenceforth continually has been and still is in possession of the same, &c. To this there was a general demurrer, and joinder.

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Wood, in support of the demurrer, was stopped by the Court, who asked *Williams*, Serjt. for the defendant, whether it was possible to support the replication.

TAUNTON v. COSTAR.

Williams, Serjt. said he could distinguish this case from *Taylor* v. *Cole*,* where the sheriff to an action of trespass for breaking and entering the plaintiff's house and expelling him, pleaded as to the expulsion that he entered by virtue of a writ of execution and assigned the plaintiff's interest to T. H., who afterwards entered &c., and peaceably and quietly expelled the plaintiff, &c.: whereas here it appears that the plaintiff entered upon the defendant's possession, and that the latter retained the possession still; so that if the plaintiff could justify his act in this case, it would dispense in future with the necessity of bringing an ejectment where the party is entitled to enter against another who holds the possession.

LORD KENYON, Ch. J.:

The case is too plain for argument. Here is a tenant from year to year, whose term expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear that the landlord could have justified under a plea of *liberum tenementum*. If indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry: but there can be no doubt of his right to enter upon the land at the expiration of the term. There is not the slightest pretence for considering him as a trespasser in this case; and therefore there must be judgment for the plaintiff.

GROSE, J. and LAWRENCE, J. concurring,

Judgment for the plaintiff.†

* 3 T. R. 292, 1 R. R. 706.

† Vide *Birch* v. *Wright*, 1 T. R. 378—388, 1 R. R. 223—235. The action of ejectment supposes the defendant to be a trespasser.

HODGSON AND ANOTHER, ASSIGNEES OF EDWARD WARD, A BANKRUPT, *v.* LOY.

1797. *Nov.* 23.

[440]

(7 T. R. 440—446.)

A consignor's right of stopping goods *in transitu* is not taken away by the consignee's having partly paid for the goods.

IN trover to recover the value of 138½ firkins of butter, which was tried at the last assizes for the country of Cumberland before Rooke, Justice, a verdict was found for the plaintiffs for 322*l.* subject to the opinion of the Court upon the following case; The plaintiffs claimed as assignees under a commission of bankrupt against Edward Ward dated the 25th March, 1797. In the beginning of February, prior to his bankruptcy, the bankrupt who was a butter merchant residing in Cumberland, purchased sixty firkins of butter of one Cowper, at 41*s.* per firkin and paid one halfpenny earnest. It was originally agreed that Ward was to pay 40*l.* of the purchase money in cash upon the Tuesday se'nnight following the contract, and on which day the butter was to be delivered; the 40*l.* was not paid on the day specified, but on that day Ward purchased of Cowper 44½ other firkins of butter, making in all 104½, and Cowper being indebted to Ward in the sum of 20*l.* Ward in addition to that sum paid him 30*l.* more on account of the butter, and having promised to send him a bill for 100*l.* he afterwards did so; but that bill when it became due was not paid. On the same day that the latter contract was made with Cowper, Ward purchased of one Wilson 34 firkins of butter, and both Cowper and Wilson agreed to deliver the butter to one Golding a carrier, who said on his examination that he carried it on Edward Ward's account to be forwarded by him to Stockton in its way to London. And at the same time Ward desired that the butter might be marked with the initials C. W., (meaning Christopher Ward his brother in London) to whom he usually sent his butter consigned for sale on his own account, and which initials the bankrupt had constantly used for seven years upon such consignments. The butter was accordingly delivered on the appointed day by the vendors, to Golding the carrier, who was desired by the bankrupt to forward the butter as

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usual to one Wilkinson, the wharfinger usually employed by the bankrupt at Stockton, to be by him shipped for London. When the butter was delivered to Golding the carrier, he entered it in his book and way bill in the name of Edward Ward, and carried it on Ward's account; and the vendors told him Ward was to pay the carriage. Golding the carrier carried the firkins as far as Bowes, and there delivered them to *one Savage, another carrier, who received no other instructions but from the way bill, which only shews from whom they come, and from that he knew what to do with them. He proceeded with them to Stockton, and they were delivered by him to Wilkinson the wharfinger, who had frequently received butter on Ward's account for the purpose of carriage, and who had general directions from E. Ward to send to C. Ward in London. Wilkinson, when he received the 138½ firkins in question, understood that he received them on E. Ward's account, and immediately on their arrival wrote a letter to E. Ward acknowledging the receipt of the butter, and also one to C. Ward to acquaint him of the same fact and of the name of the ship by which they were to be forwarded to London. Before the butter reached London, C. Ward and E. Ward both stopped payment and became bankrupts; and the defendant as agent of Cowper & Wilson got possession of the butter on its arrival in the river, and upon a demand made on behalf of the plaintiffs refused to deliver it, saying he was indemnified by Cowper & Wilson, and admitting that he had sold it for the price for which the damages are assessed. In June last Cowper tendered to the plaintiffs the bill for 100*l.* which had been given by E. Ward to him, and the money which he had received, but the plaintiffs refused to receive the same.

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Park, for the plaintiffs [contended], 1st, That the delivery of the goods to Golding the carrier, according to the terms of the contract, by the direction of the bankrupt was a delivery to the bankrupt himself. It is stated in the case that Golding received them on the bankrupt's account. In order to defeat the vendor's right of stopping *in transitu* it is not necessary, as was holden in *Ellis* v. *Hunt*,† that the goods shall come into the actual

† 1 R. R. 743.

possession of the vendee. *That case turned on the fact of the provisional assignee under the vendee's commission, having taken possession of the goods while in the warehouse of the inn, where the carrier put up by fixing his mark on them. Now here the bankrupt's mark was upon the goods at the time they were delivered to Golding as his special agent. It was holden in the present term, upon a motion for a new trial in a case of *Fowler* and another, assignees of *Hunter & Co.* v. *M'Taggart & Co.*, tried before Grose, J. at Bristol, that a delivery of goods into a ship chartered by the vendee, who afterwards became a bankrupt, was a delivery to him, so as to defeat the vendor's right to stop *in transitu*;† though it might as well have been contended there that the delivery was only for the purpose of conveyance to the place of their destination. But further, there was a delivery of the goods by the particular direction of the bankrupt to Wilkinson at Stockton, who (the case states) was usually employed by the bankrupt, and who was acting under general instructions from him to receive such goods and forward them to his brother in London. Therefore supposing that the possession of Golding in the first instance, might be considered as common to both the parties, yet Wilkinson to whom a special delivery was made by the order of the bankrupt, cannot be considered as a common agent between them; and that distinguishes this case from others which may be cited. 2ndly, [That, there having been a part payment for the goods the right of stoppage *in transitu* could not take place.] In *Wiseman* v. *Vandeput*,‡ which was the first case in Chancery of the kind, the rule was laid down that the vendors might stop *in transitu*, the vendees having paid no money for the goods. *So in the case of the assignees of *Burghall* v. *Howard*,§ Lord MANSFIELD said that he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price has been paid, the consignor may seize the goods before they come into the hands of the consignee. * *

[*442]

[*443]

† See *Berndtson* v. *Strang* (1867—68) 4 Eq. 481, 491, L. R. 3 Ch. 588, 37 L. J. Ch. 665; *Schotsmans* v. *Lancashire & Yorkshire Ry. Co.* (1867) L. R. 2 Ch. 332, 36 L. J. Ch. 361.—R. C.

‡ 2 Vern. 203.

§ Sittings at Guildhall after Hilary 32 Geo. II., 1 H. Bl. 365, 6 *n.*

HODGSON v. LOY.

Chambre, contrà:

1st, Here was no such delivery to the bankrupt as was sufficient to devest the vendor's right to stop *in transitu.* The delivery to Golding in the first instance, and afterwards that by him to Savage, and by Savage to Wilkinson, were all deliveries made to them in the capacity of common carriers, and not as private agents of the bankrupt. They were respectively made for the purpose of forwarding the goods, and for no other purpose. The circumstance of the bankrupt's desiring Golding to carry the goods to Wilkinson as usual cannot vary the nature of the agency. It was only in affirmation of the purpose for which the vendors had before made the delivery to Golding. Supposing this conversation even to amount to the appointment of Wilkinson as a special carrier named by the vendee, that would not alter the vendor's right to stop *in transitu.* [*Ellis* v. *Hunt*, 3 T. R. 464, per BULLER, J. 469, 1 R. R. 743, 744; and *Stokes* v. *La Rivière*, mentioned in 3 T. R. 466, and 1 R. R. 744.] *The case of Hunter and others, assignees of *Blanchard & Lewis* v. *Beale*† is much stronger than the present; for there the bankrupt (vendee) had directed the innkeeper at the place where the goods were sent to forward them down to the quay, in order to their being shipped, which was accordingly done, but arriving too late, they were sent back to the inn, after which the vendee's servant went to the warehouse and gave particular directions what should be done with the goods, till another opportunity of shipping them offered. * * 2ndly, It has never been decided that part payment made any difference in cases of this kind; nor is it reasonable that it should; for then some trifling sum, by way of earnest, would always be paid to prevent the legal right of the vendor attaching. The foundation of that right is, that the vendor has a just lien on his goods for the full value of them, until they are actually delivered to the vendee. * * Here the vendors have elected to retake their goods, and have tendered the money paid in part for them, and also the bill which was dishonoured. * *

[*444]

† Sittings after Trinity, 1785, at Guildhall, cor. Lord Mansfield, cited in *Ellis* v. *Hunt*, 1 R. R. 744.

Park in reply, observed that this was distinguishable from the common case of a delivery to a carrier, because here it was part of the original agreement that the goods should be delivered to Golding. The acts of the bankrupt afterwards shewed that he considered Golding as his special agent: for he gave particular directions to him in what manner the goods should be forwarded, which Golding obeyed, considering himself as the bankrupt's special servant. With respect to *Hunter* v. *Beal*, it differed in this, that there the goods were sent to a person in London of the vendor's own choosing; and though the bankrupt afterwards gave directions to that person where to send the goods, yet they were never out of his possession till they were retaken by the vendor. Whereas here they got into the hands of a person who was not only the general, but in this case the appointed, agent of the vendee.

After this case was argued,

Lord KENYON, Ch. J. said that on the general question respecting the right of the vendors to stop these goods *in transitu*, no doubt could be entertained, for that this case could not be distinguished from those cited in which that doctrine had been established and recognized. And that the case of *Hunter* v. *Beal* was much stronger than the present. But, on the other point respecting payment, his lordship said he did not think that this took the case out of the general rule, and that he should be sorry to let in such an exception because it would destroy the rule itself; since every payment however small, even the payment of a farthing by way of earnest, would, if such an exception were introduced, prevent the operation of the general rule of stopping *in transitu*. And he added that the right of the vendor to stop goods *in transitu* in case of the insolvency of the vendee was a kind of equitable lien adopted by the law for the purposes of substantial justice, and that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding * the contract.

* On this point see *Wentworth* v. *Outhwaite*, 10 M. & W. 436; *Page* v. *Cowasjee* (1866) L. R. 1 P. C. 127, 145; Indian Contract Act, No. IX. of 1872, ss. 106, 107; *Phelps* v. *Coomber* (1885) 29 Ch. D. 813, 821, 54 L. J. Ch. 1017 (per COTTON, L.J.) All these authorities confirm the view of Lord KENYON here stated. —R. C.

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The other judges however expressing a wish to have an opportunity of examining the cases cited, in order to see whether the circumstances of part payment by the vendee took this case out of the general rule, and being desirous that there should be an uniformity of decisions on this subject, a second argument was ordered on this second point; the Court being unanimous on the first. But on this day

[446] LORD KENYON, Ch. J. delivered the opinion of the Court in favour of the defendant, in substance, as follows:

We have looked into the case cited on the second point respecting the part payment of the goods by the vendee; and as this is a case of great consequence to the commercial world, and as it is of vast importance that questions that have been long settled, should not be set afloat again on account of some trivial circumstance that formed no ingredient in some of the decisions in which the general doctrine was established, and as we have no doubt ourselves on this subject, we think that the case should not be argued again. When the distinction was first taken at the bar, I thought it not well founded; and on looking into the cases that were referred to in support of it, we are clearly of opinion that the circumstance of the vendee having partly paid for the goods, does not defeat the vendor's right to stop them *in transitu*, the vendee having become a bankrupt; and that the vendor has a right to retake them unless the whole price has been paid. And indeed the lords commissioners seem to have been of the same opinion in the case of *Wiseman* v. *Vandeput*; for "they decreed an account that if anything were due from the Italians (the consignors) to the Bonnels (the consignees) that should be paid to the plaintiffs, but they should not have the value of the silks by virtue of the consignment." Therefore we would not have it supposed that there is any doubt on this question. The consequence is that the postea must be delivered to the defendant.

*Postea to the defendant.**

* He agreeing to repay the money paid by the bankrupt.

CATMUR *v.* SIR E. KNATCHBULL, BART. AND OTHERS.

1797. *Nov.* 25.

[448]

(7 T. R. 448.)

The Court will not grant an attachment against a member of parliament for non-payment of money according to an award.

ON an objection taken by the defendant's counsel, it was admitted by the other side, and ruled by

The COURT, that an attachment could not be granted against the defendant, who was a member of the House of Commons,* for non-payment of a sum of money under an award. The rule for an attachment against him was accordingly discharged.

Mingay in support of the rule.

Garrow against it.

WORTHINGTON AND OTHERS *v.* BARLOW, ADMINISTRATRIX.

1797. *Nov.* 28.

[453]

(7 T. R. 453.)

If an arbitrator, under a reference between A. and B. administrators, award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that he had no assets, but may be attached for non-payment.†

WIGLEY having moved for an attachment against the defendant for not paying the sum of 2,664*l.* 13*s.* 8*d.* according to an award, in which the arbitrator had ascertained the amount of the plaintiff's demand, as above, and directed the defendant to pay it,

Hughes shewed cause against the rule, on this ground, that the administratrix had no assets, and that the submission to an award by an administrator, was not an admission of assets, as was said in *Pearson* v. *Henry*, 5 T. R. 6 (2 R. R. 523).

* Vid. *Walker* v. *The Earl of Grosvenor*, *ante*, 410, where the Court said that such an attachment could not be granted against a peer.

† Cf. *Barry* v. *Rush*, 1 R. R. 360; *Pearson* v. *Henry*, 5 T. R. 6, 2 R. R. 523.

WORTHINGTON v. BARLOW.

LORD KENYON, Ch. J.:

The decision in *Pearson* v. *Henry* must be taken with reference to the facts of that case. There the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it: but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix, was a reference not only of the cause of action, but also of the other question whether or not the administratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay this debt. The defendant therefore is concluded by this award, though it will not operate as an admission of assets in any other action to be brought by any other creditor.

Rule absolute.

K. B. HILARY TERM.

GREATHEAD *v.* BROMLEY.

1798. *Jan.* 25.

[455]

(7 T. R. 455—456.)

The same rule as to *res judicata* applies to a summary application to the Court under a statute, as to an ordinary action. If an action is brought and the merits discussed and a final judgment obtained, facts and arguments 'competent and omitted' to have been brought forward in that action cannot be urged to canvass the same question between the same parties in another action.*

A RULE had been obtained in the last Term, calling on the plaintiff to shew cause why a bond and warrant of attorney for securing an annuity, should not be set aside, on the ground that certain requisites of the 17 Geo. III. c. 26, had not been complied with. This matter stood in the peremptory paper for this day: but when it was called on,

* LORD KENYON'S judgment in this case is quoted in the judgment of MARTIN, B. in *Newington* v. *Levy* (Ex. Ch. 1870) L. R. 6 C. P. 180, 188, 40 L. J. C. P. 29.—R. C.

Garrow and *Gibbs* made a preliminary objection to the discussion of the merits, because they had been investigated a few years ago upon a similar rule between these parties, upon the same state of facts then existing, when the Court having heard every objection which was then urged, discharged the rule with costs. And the former proceedings on the files of the court were referred to in support of the objection.

Erskine and *Plowden*, in support of the rule, admitted that such an application was made; but stated that they had objections to offer now, which were not then entered into, and which were fatal to the annuity under the Act of Parliament. But

LORD KENYON, Ch. J. said: [456]

The Act of Parliament gives a summary jurisdiction to the Court, which is to be exercised according to sound legal discretion; and we cannot govern our discretion better than by analogy to the proceedings at common law. Now if an action be brought, and the merits of the question discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial, which would have led to a different judgment. So here, as it appears that all the facts now brought forward in the affidavits in support of the rule, existed at the time of the former rule, and every objection which can now be urged might then have been brought forward, the matter must now be taken to have passed in *rem judicatum*, and the former decision is conclusive between the parties.

Per CURIAM:

Rule discharged.

1798.
Jan. 25.

[456]

JOHN HILL, One, &c. Ex parte.

(7 T. R. 456—458.)

The stat. 2 Geo. II. c. 23;* requiring (as a previous qualification to being admitted as an attorney) that the party shall continue in the service of the attorney to whom he is articled for five years, is not complied with by the clerk serving part of the time with another attorney, with his master's consent, and the rest of the time with his master.

An application was made to strike John Hill off the Roll of attornies of this Court, on the ground of his not having served the regular time of five years as an articled clerk with an attorney, previous to his admission in Hilary Term, 1796.

Upon shewing cause the facts appeared to be these: Previous to the year 1791, he served as a writer to Thomas Webb, an attorney, living at Birmingham, to whom he applied to be articled and was refused. Upon which, in January, 1791, he articled himself to Hughes an attorney, who then lived seven miles from that town; but as Hughes was about removing thither, and as most of his business lay there, it was considered more convenient for Hill to remain where he was, till Hughes settled at Birmingham; which Hill accordingly did, and continued to write for Webb for ten months after he was so articled to Hughes. But during that time he did attorney's business for Hughes from time to time in Birmingham, whither Hughes frequently went, and in particular Hill sued out process for him on several occasions out of the county court. And at the end of the ten months, when Hughes removed to Birmingham, Hill went and resided with him altogether.

Erskine and *Park* shewed cause against the rule.

Clarke in support of it was stopped by the Court.

* The Act now in force is 6 & 7 Vict. c. 73, ss. 6, 12, 13 (subject to the omission of the words repealed by 51 & 52 Vict. c. 65, s. 20); and the provisions, so far as relates to the case in point, are substantially the same. The case is acted on as an authority under the Act of 6 & 7 Vict. in *Ex parte Adams* (1875—6) L. R. 10 Q. B. 227, 4 Ch. D. 39.—R. C.

JOHN HILL, Ex parte. [457]

LORD KENYON, Ch. J.:

The question before us is whether, on the facts disclosed to the Court, Hill has complied with the requisites of the Act of the 2 Geo. II. c. 23, which prohibits any person to be admitted an attorney, unless he shall have been bound by contract in writing to serve as a clerk to an attorney for five years, and shall have continued in such service for the said term of five years. Now if this kind of service were deemed sufficient within the Act, why might not a service with a person of any other occupation, by the consent of the master to whom he was articled, be deemed sufficient? It is true that in the present case Hill might have been improving himself as much in his profession by serving Mr. Webb, as if he had served his own master; but the question is whether he has complied with the directions of the Act, requiring him to serve the person to whom he is bound, and to continue in such service for five years? And how can he be said to have done so during ten months of the time, when he was serving another person at the distance of seven miles? It is not enough to say that during that time he occasionally did business for Hughes, or attended the hundred court, which is holden once in three weeks. However hard the case may press on this individual, we must not make the law bend to our wishes, but must see that there has been such a service as the Act requires. But that does not appear to have been performed in this instance. The main part of his business during the first ten months was done in another man's service, and not in the service of the master to whom he was articled.

ASHHURST, J.:

It is not fit that we should relax the rule of service required by the Act; the plain meaning of which was that the clerk should continue serving his master the whole time of probation required. If we break through that rule in one instance I do not know what other line can be drawn, or where we are to stop.

GROSE, J.:

The question is, whether this person has served his master for

JOHN HILL, Ex parte.

five years previous to his admission, within the meaning of the Act: Now can he be said to have done so, when he was serving another master part of that time? Under these circumstances I do not see how the party could conscientiously have taken the oath required.

LAWRENCE, J.:

The object of the Act was to prevent the admission of unfit persons to be attornies; for which purpose it required that they
[*458] should serve the masters to whom they were *articled for five years. Now if it were sufficient to serve any other person during that time, provided it were with the consent of the master, the object of the Act would be defeated. This is very much like a case which lately came before the Court from Penzance upon a similar question. There an attempt was made to support a service with an attorney, by shewing that the party who lived in Penzance, at a distance from the attorney, had occasionally done his business for him there in the county court; but the Court held that was not sufficient.

*Rule absolute.**

1798. *Jan.* 29.

DOE, ON THE DEMISE OF BASS, *v.* ROE.

(7 T. R. 469.)

[469]

In certain cases the Court will permit an amendment to be made in a notice at the bottom of a declaration in ejectment.

A DECLARATION in ejectment for lands in Devonshire having been delivered with notice to the tenants to appear in Michaelmas Term last, which was wrong, as the notice in a country ejectment must, according to the practice, be to appear in an issuable Term;

Cowper obtained a rule in the last Term, on behalf of the

* The 22 Geo. II. c. 46, s. 8, expressly requires that every person who shall become bound, &c., shall, during the whole time or term of service, continue and be actually employed by such attorney or solicitor, or his or their agent or agents, in the proper business of an attorney or solicitor.

lessor of the plaintiff, calling on the defendants to shew cause why the notice should not be amended, by inserting Hilary instead of Michaelmas Term, on payment of costs, on an affidavit stating that the lessor of the plaintiff could not now bring another ejectment on account of the Statute of Limitations, the twenty years having expired after this declaration was delivered and before the mistake was discovered, and stating also that the lessor of the plaintiff had been hitherto prevented by poverty trying his cause before.

Gibbs, who now shewed cause, mentioned the case of *Roe* d. *Stephenson* v. *Doe*, Barnes, 186, to shew that formerly no amendments were permitted to be made even in declarations in ejectment; and he said that there was no instance in which the Court had ever permitted an amendment to be made in the notice at the end of the declaration; and that the reason suggested for allowing this amendment was rather a reason why the Court should refuse it, since the application was in effect to extend the time in the Statute of Limitations.*

Per CURIAM:

The case cited from Barnes has been long since overruled. The courts have been of late years much more liberal than they were formerly in every part of the practice respecting ejectments. By refusing this rule we may probably do great injustice, whereas by granting it we shall merely give the lessor of the plaintiff an opportunity of trying his title.

Rule absolute.

Note.—Although the particular matter of amendment is obsolete, the above case is retained as showing the principle on which amendments may be made in proceedings which affect the running of the Statute of Limitations.—R. C.

* Vid. *Maddock q. t.* v. *Hammett*, 7 T. R. 55, and the cases there cited.

1798.
Feb. 5.

DOE, ON THE DEMISE OF COLLINS, *v.* WELLER.

(7 T. R. 478—480.)

[478]

By a marriage settlement, an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses, appoint, and for want of such appointment reversion to herself in fee: during her husband's life she made a will in pursuance of the power, devising the estate to A. in fee; after which she and her husband executed a lease of part of the settled estate to the defendant, not executed pursuant to the power; and after her husband's death she received rent from the defendant: Held that such lease was voidable only by her upon her husband's death; and that her receipt of rent accruing afterwards, was a confirmation of it against A. who claimed under her appointment by the will.

Where tenant for life grants a lease for years, which is void against the remainderman, and the latter before he elects to avoid it receives rent from the tenant, whereby a tenancy from year to year is created, yet this is with reference to the old Term, and therefore a half-year's notice to quit from the remainderman ending with the old year is good.*

IN ejectment for a messuage the question turned on this point, whether a lease of the premises from Charles Butcher and Jane his wife (under which last the lessor of the plaintiff claimed) to the defendant for twenty-one years, commencing from the 25th March, 1780, were the valid lease?

It appeared that in August, 1771, Jane Palmer (afterwards Jane Butcher) being seised in fee of the premises, previous to and in contemplation of her marriage with Charles Butcher, by lease and release conveyed the same to trustees and their heirs to the use of herself in fee until the marriage, and afterwards to the use of herself for life, remainder to the use of such person, and for such estates as she, notwithstanding her covertures, should by deed or will executed in the presence of three witnesses appoint, and for want of such appointment, to the use of herself in fee. The marriage took place, and the lease in question was afterwards granted by the husband and wife, attested by two witnesses only. The husband died about three years ago, after which the wife received rent of the defendant for the premises

* The latter point is also established by the authority of *Roe* v. *Ward*, 1 H. Bl. 98, 2 R. R. 728; and *Kelly* v. *Patterson* (1874) L. R. 9 C. P. 681, 43 L. J. C. P. 320.—R. C.

accruing after the husband's death. The wife herself died on the 4th December, 1795; and by her will attested by three witnesses, and executed in the lifetime of her husband, and prior to the lease to the defendant, after reciting the settlement and the power thereby reserved to her, devised the premises to the lessor of the plaintiff in fee. Since her death, the lessor of the plaintiff, after having accepted rent from the defendant accruing after the death of Mrs. Butcher, gave him a half year's notice to quit ending at Lady Day, 1797.

Two objections were taken at the trial before Lord Chief Justice Eyre at the last assizes for Sussex. 1st, that the lease by the husband and wife of the wife's land was not void as to the wife but merely voidable after she was discovert; and that the wife had confirmed it by accepting rent accruing after her husband's death. 2ndly, supposing the lease not to be valid, as not having been executed under the power reserved to the wife, and that the *lessor of the plaintiff claiming as remainder-man [*479] under the execution of that power may elect to avoid it, yet having since accepted rent from the defendant, whereby the latter became tenant from year to year, such tenancy must be taken to commence from the 4th of December, 1795, when Mrs. Butcher died, till when the former lease subsisted; and consequently the notice to quit at Lady Day, 1797, was irregular. The learned Judge overruled both the objections, and a verdict was taken for the lessor of the plaintiff, with liberty for the defendant to move to set it aside and to enter a nonsuit, in case this Court thought either of the objections well founded.

Shepherd, Serjt. accordingly moved for that purpose in the last Term upon both grounds: but

The COURT, being clearly of opinion that there was no foundation for the last objection, and that the acceptance of the rent by the lessor of the plaintiff, had relation to the old contract, and not to any new agreement,† granted the rule *nisi* upon the first objection only.

† *Doe* v. *Watts*, p. 387, *ante*; and *Sykes* d. *Margatroyde* v. ——, cited in *Right* v. *Darby*, 1 T. R. 161.

DOE
r.
WELLER.

Erskine, *Marryat*, and *Best*, now shewed cause; and insisted first that the lease was absolutely void, it not being attested conformably to the power, considering Mrs. Butcher merely as tenant for life, at that time when the lease was executed. (This argument was advanced without adverting to the conclusion of the settlement, whereby it appeared that Mrs. Butcher had the reversion in fee in her at that time. But when their attention was drawn to that circumstance.) They contended secondly, that the lessor of the plaintiff claimed under a will executed in pursuance of the power, antecedent to the defendant's lease and paramount to it.

Wood, *contrà*, cited several authorities to shew that a lease by the husband and wife of the wife's land, whereof she was seised in fee, was only voidable by her after her husband's death; and that her receipt of rent afterwards was a confirmation of the lease, binding herself and all who claimed under her. Bro. Rescit. pl. 70; Acceptance, pl. 6; 2 And. 42; Dy. 159; *Wooton* v. *Hele*, 1 Mod. 291; *Goodright* v. *Straphan*, Cowp. 203, 4 Vin. Abr. 101. * * *

[480] LORD KENYON, Ch. J.:

The reversion in fee being in the wife at the time of the lease executed makes an end of this question; for the lease being only voidable, her receipt of rent after her husband's death confirmed it. And her will which was ambulatory till her death, cannot vary the case; for it could have no operation during her lifetime, and any act which was afterwards done by her inconsistent with her will was *pro tanto* a revocation of it. If indeed the question had turned upon the power of appointment, the lease not being attested conformably thereto, could not have been supported in a court of law; yet even then being granted for a valuable consideration and merely defective in point of form, a court of equity would have interfered, and directed a proper lease to be granted. In *Rattle* v. *Popham*,* though Lord HARDWICKE in a court of law held himself bound to decide against a lease not duly executed according to a power reserved, yet Lord TALBOT

* 2 Str. 992.

presiding in the Court of Chancery, upon a bill filed by the lessee, decreed the lease to be binding on the parties, and made the defendant pay all the costs in law and equity.*

DOE v. WELLER.

Per CURIAM:

Rule absolute.

BARWICK ON THE DEMISE OF THE MAYOR AND ALDERMEN OF RICHMOND, IN YORKSHIRE, *v.* THOMPSON AND OTHERS.

1798. *Feb.* 6.

[488]

(7 T. R. 488—492.)

If B. claiming under A. let lands for a year to C. and die, and A. afterwards bring an ejectment against C., C. cannot dispute the title of A.

AT the trial of this ejectment, which was brought to recover certain premises at Richmond, on a demise stated to have been made to the plaintiff "by the mayor and aldermen of the borough of Richmond, guardians and governors of the possessions, revenues, hereditaments, and goods of the Free Grammar School of the burgesses of the borough and town of Richmond in Yorkshire," a verdict was taken for the plaintiff, subject to the opinion of this Court on a case in substance as follows:

King Henry the Seventh by letters patent (dated 19 Hen. VII.) confirmed to the free burgesses, certain lands, &c. theretofore granted to them by king Henry VI. Queen Elizabeth by letters patent (an. 9 Eliz.) granted and ordained that for the future there should be a school, called The Free Grammar School of the Burgesses of the Borough and Town of Richmond, &c.: that there should be one master; and in order that the lands, &c. to be granted and appointed for the maintaining of the school, might be the better governed for the continuance of the same school, she willed and ordained that in future the four bailiffs of the borough for the time being, should be, and should be called Governors of

* It seems in that case from what is said in 2 Burr. 1147, that Lord TALBOT held the lease to be warranted by the power saying it was a blundering but not a defective execution of it. But see the case of *The Dean and Chapter of St. Paul's* to this point mentioned at the end of the case of *Alexander* v. *Alexander*, 2 Ves. Sen. 645—6.

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the possessions, revenues, hereditaments, and goods of the said school; she also appointed the then bailiffs of the borough, to be guardians and governors of the school, and ordained that the same governors *during the time they should be bailiffs, and their successors bailiffs of the borough, governors of the said possessions, &c. should be a body corporate and politic for ever, by the name of "The guardians and governors of the possessions, revenues, hereditaments, and goods, of the free grammar school." She also willed and granted that the said governors and their successors might plead and be impleaded in any action, &c.; might purchase and take lands for the support and maintenance of the school; might appoint a master whenever a vacancy should happen, and might make statutes and ordinances touching the direction of the schoolmaster and his salary, and the dispositions of the rents and revenues of their lands, &c. The same letters patent also contained a grant to the burgesses of the borough of Richmond and their successors of a fair to be holden on a certain day. Queen Elizabeth by another charter (an. 19 Eliz.) incorporated the town of Richmond by the name of "The aldermen and burgesses of the borough of Richmond:" giving them power by that name to purchase and take lands, to plead and be impleaded ordaining that there should be one alderman and twelve burgesses only granting to the said alderman and burgesses and their successors that they should have all and singular customs, privileges, &c. granted to them, or their progenitors by whatever name or names, and such lands as the men and burgesses of the town of Richmond ever had or enjoyed by whatever name, &c. and giving them power to appoint constables and other officers in the town as the men and burgesses of the town had been accustomed to do. King Charles the Second by a charter (an. 20 Car. II.) incorporated the town by the name of "The mayor and aldermen of the borough of Richmond;" willing and ordaining that all grants, gifts, powers, interests, and authorities whatsoever, of or concerning any use through means of piety or charity, or any other use which at any time before had been settled or vested in the alderman of the borough, or in the alderman and burgesses, or which had been exercised or enjoyed by them, should be vested in the mayor, aldermen, and burgesses, and their

[*489]

successors; and confirming to the mayor, aldermen, and burgesses of the said town, and also to the free burgesses of the said town all land, &c. and all liberties privileges, &c. which the alderman and burgesses of the town or any of their predecessors had had or enjoyed, &c. The bailiffs of the said borough or town were officers continued and in being after the acceptance of the charter of the 19th of Queen Elizabeth and are mentioned in certain entries made respecting the school by *the aldermen and [*490] burgesses inserted in one of their corporation books. Both before and after the granting of the charter of Charles the Second to the year 1706, leases for years by deed were from time to time, granted of different parts of the land now in question, with others, in which leases the bailiffs for the time being, of the borough, were joined with the aldermen and burgesses, or with the mayor and aldermen, as demising with the general consent of all the rest of the burgesses of the borough, under the yearly rents payable to the respective lessors and their successors; with a proviso that if the same should be unpaid, after being demande by the bailiff of the said free school and no sufficient distress found upon the premises, then it should be lawful to the respective lessors and their successors to re-enter, &c. Previous to the granting of the charter of the 20 Car. II. the bailiff for the time being accounted with the then aldermen, and the rest of the burgesses in different years for all their receipts of rents of the school lands, crediting themselves for salaries paid to the master and usher for repairs and taxes, paying over to or receiving for their successors, the balance or deficiency yearly, and amongst other things, they charged therein the sum of 8*s*. as their allowance, all which accounts are signed by the alderman for the time being, and examined and allowed. And in the year 1677-8 after the granting of the charter of the 20th Car. II. there appears an account of the bailiffs, allowed, and signed by the then mayor, in which they accounted for certain fines received by them on granting new leases of the lands belonging to the grammar school, and the rents thereof, which (it thereby appears) they paid for re-building the school, and the master and usher for their salaries.

In June, 1704, an order was made by the mayor and aldermen

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"trustees of the free grammar school," &c. ordering an addition of 10*l.* per annum, to be made to the master's salary during the continuance of the then leases of the school, and ordering the chamberlains of the borough to pay the same, which sum the chamberlains paid. In October, 1718, the mayor and aldermen as "keepers and governors of the possessions, revenues, hereditaments, and goods of the free grammar school," &c. with the consent of the common council exchanged some of the school lands for other lands with Mr. Copley. In 1722 the mayor and aldermen as "guardians and governors," &c., elected Mr. Close to be master of the school; in 1732 they as "guardians," &c., made several leases of the school lands: and in 1750 they made
[*491] certain *ordinances and bye-laws of the school, one of which was that the master for the time being should receive the rents and profits of the school lands. After the death of Mr. Close in 1750, they as guardians and governors, &c. elected Mr. Temple to be master, who continued in that office until his death in April, 1795, since which time no successor has been appointed. During Mr. Temple's lifetime he let the school lands, as the leases expired, to several tenants from year to year, and (among the rest) the lands in question to the defendants, who paid rent to Mr. Temple as long as he lived. In 1752, the mayor and aldermen sold a parcel of wood then growing upon the school lands, and with the produce prepared the school. There are now officers called chamberlains, who receive rents and act as bailiffs for the mayor and aldermen of the borough. The mayor and aldermen gave regular notice to the defendants to quit. The above facts were proved on the part of the plaintiff.

Raine, on behalf of the plaintiff, made a preliminary objection to the defendants being permitted to dispute the title of the lessors of the plaintiff, because it appeared by the case that they claimed under the late Mr. Temple who was appointed by the lessors of the plaintiff; and that this case therefore came within the reason of the common rule, that a tenant shall not be allowed to dispute the title of the landlord under whom he holds.

Holroyd, *contrà*, answered that the defendants did not hold

under the lessors of the plaintiff, with whom they had no connexion, but under the late Mr. Temple; but that even if they held under the mayor and aldermen of Richmond, there was no reason why they should not be allowed to inquire into the validity of their title, as all the evidence of title was given by the plaintiff himself; and that in this respect this case differed from the ordinary one where a tenant is not suffered to bring evidence to impeach his landlord's title, the evidence given by the lessors of the plaintiff here having negatived their own title.—He was then proceeding to shew that the mayor and aldermen of Richmond formed a distinct corporation, from that of the guardians and governors of the free school, in which latter the lands in question were vested; but

The COURT were of opinion that as the defendants held under the late Mr. Temple, who was appointed by the mayor and aldermen of Richmond in the characters of guardians and governors of the free school, they ought not now to dispute the title of the lessors of *the plaintiff, and that it was immaterial [*192] whether the defendants held immediately under the mayor and aldermen, or under the late master who claimed under the mayor and aldermen. They also intimated a very strong opinion that the lessors of the plaintiff were entitled to recover on the merits of the case; for that though it did not distinctly appear how the mayor and aldermen became guardians and governors of this school instead of the bailiffs who were incorporated by the charter of Elizabeth, or how the one corporation was connected with the other, yet it appeared that since the year 1704 the mayor and aldermen had on all occasions acted as the trustees, and had received the rents and profits of the lands in question either by themselves or their agent the master for the time being. That after such a length of time a new charter might even be presumed. And that, without minutely inquiring into the antiquity of a title, a clear and undisturbed possession for twenty years was in itself a sufficient title in an ejectment.

Postea to the plaintiff.

1798.
Feb. 6.

MARY SKERRATT *v.* OAKLEY.†

(7 T. R. 492—494.)

[492]

A. by will bequeathed to his wife (besides some other legacies) a leasehold estate at N. for her life, and a leasehold estate at W. to B.; and by his codicil he directed that the bequests to his wife in his will should be in full of all claims she should be entitled to on his real or personal estate (except the estate for life of his wife in the premises at W.): Held that the wife was not entitled to the estate at W. by the codicil.

THIS was an action of covenant brought by the plaintiff as assignee of John Skerratt for the rent of some leasehold premises at Wrentnall, under a demise made by John Skerratt and T. Blantern for twenty-one years at the yearly rent of 130*l.* payable to J. Skerratt, his executors, &c. and which lease came to the defendant by assignment.

[493]

[The question in the case turned upon the will and a codicil, made by the above mentioned J. Skerratt. By his will] the testator, after giving to his wife 700*l.* to be paid to her and her executors, &c. out of his personal estate not therein before particularly bequeathed, and the yearly interest of the sum of 1,200*l.* for her life, gave and devised to her for her life, certain premises in Northwood which he held for lives under T. Blantern; and as for his leasehold estate at Wrentnall, which he held under R. Smythe, and also his estate at Northwood, after his wife's decease, and all the residue and remainder of his real and personal estate, and also the sum of 1,200*l.* after his wife's death, he gave and devised one moiety to G. Walmsley, his heirs, executors, &c. and one moiety of the other moiety to J. Gough, his heirs, executors, &c. and the other part of the other moiety to E. Gough, for her life, remainder to J. Gough, his heirs, executors, &c. By the codicil he directed that the 700*l.* bequeathed to his wife, and other bequests made to her by his will should be in full of all demands, to which she should be entitled in or out of his real or personal estate, except the estate for life of his wife and her assigns to the premises at

† Referred to and followed in the judgment of *Cosby* v. *Millington* (Ex. Ch. 1869) 38 L. J. C. P. 376.—R. C.

Wrentnall aforesaid, any thing in his foregoing will to the contrary thereof contained in any wise notwithstanding. SKERRATT v. OAKLEY.

[After argument:]

LORD KENYON, Ch. J.: [494]

This case must be decided according to the intention of the testator, as that intention is to be collected from the several parts of the will and the codicil taken together. Now it is impossible to read them without seeing that the word Wrentnall was written in the codicil instead of the word "Northwood:" in reciting in the codicil what he had given by his will, the testator made that evident mistake.

GROSE, J.:

The testator did not mean to give his wife any thing by the codicil: his intention was to prevent her claiming dower or thirds, as he supposed she would be entitled to them without some such restriction; and in effecting this he used the word "Wrentnall" for "Northwood" in the recital in the codicil.

Per CURIAM:

Judgment for the defendant.

REID *v.* CLARKE AND ANOTHER.

1798. *Feb.* 7.

(7 T. R. 496—497.)

[496]

The hundred are not liable in an action for damages brought by the person injured by a mob beginning to pull down his house, &c., unless the riot be of such a kind as to amount to felony within the stat. 1 Geo. I. st. 2, c. 5.

THIS was an action on the Riot Act, 1 Geo. I. st. 2, c. 5,* against the defendants, two of the inhabitants of the hundred

* The 6th section of the Riot Act, to which this case relates, was repealed *as to England* by the Act 7 & 8 Geo. IV. c. 27; but was in effect re-enacted by 7 & 8 Geo. IV. c. 31, s. 2. See *Drake* v. *Footitt* (1881) 7 Q. B. D. 201, 50 L. J. M. C. 141. The last-mentioned Act was repealed (for England) by 49 & 50 Vict. c. 38, s. 10, which gives a remedy by compensation out of the police rate for a house, &c., destroyed or injured in a riot. This section appears to have been framed to remedy the law as declared by *Drake* v. *Footitt*. The original Riot Act is, to the extent mentioned in the last section, still in force in Scotland.—R. C.

REID v. CLARKE.

or ward of Castle. The declaration stated that divers persons to the number of twelve or more, at the parish of Tynemouth, and in the hundred or ward of Castle, did unlawfully, riotously, and tumultuously assemble to the disturbance of the public peace, and being so assembled did unlawfully, feloniously, and with force demolish, in part, a certain dwelling-house of the plaintiff, situate, &c. *ss.* the wainscoating, doors, partitions, walls, ceilings, windows, window frames, window shutters, &c., affixed to and part of the said dwelling-house, against the peace, &c., and against the statute, &c.

On the trial at the last assizes at Northumberland, before Mr. Baron Thomson, it appeared that on the 6th of March last there was an illumination in all the houses at Tynemouth, except two or three, in honour of the victory obtained by Lord St. Vincent over the Spanish fleet. That a large mob were collected in the town, who broke with stones, &c. several windows, particularly the plaintiff's, and also the stanchions of the windows, the uprights of the sashes, and all the window shutters on the inside; and who also tore up the pavement before the door of a neighbour's house; and that the plaintiff sustained damage to the amount of 6*l.* It was objected by the counsel for the defendants, that there was no demolishing of part of the plaintiff's dwelling house, and that this was not a case within the meaning of the Riot Act: the learned Judge was of that
[*497] opinion, but permitted the plaintiff to take a *verdict for the 6*l.* with liberty to the defendant to move to enter a nonsuit in case this Court should think the objection well founded.

Law having obtained a rule nisi for this purpose in the last Term,

Chambre and *Hullock* now shewed cause against it:

It is clear from the evidence given at the trial, that the rioters had begun to demolish or pull down part of the plaintiff's dwelling house, for it appears that they not only destroyed the windows but also the stanchions of the windows. The windows are part of the house, on which ground it is considered that the demolition of windows is waste. Co. Lit. 53 a; and *Herlakenden's*

case, 4 Co. 63 b. Then if this were a beginning to pull down the plaintiff's house, the case is brought within the sixth section of the Act, on which this action is founded. It is not now necessary to consider whether the rioters were guilty of a felony within the first section of the Act, because the clauses are perfectly distinct and independent of each other. To constitute a felony within the first section, it is necessary that twelve persons should be assembled, but it is not necessary that there should be that number to bring a case either within the fourth or sixth sections of the Act. *Prichit* v. *Waldron*, 5 T. R. 14. The word "feloniously" in this declaration is impertinent, and may be rejected as surplusage. Though some parts of this Act of Parliament are highly penal, yet the sixth section, which gives a remedy against the hundred, is remedial, *Wilmot* v. *Horton*, Dougl. 702, *n.* (3), and consequently it ought to receive a liberal construction.

LORD KENYON, Ch. J.:

This is an attempt to extend this Act of Parliament, which is a penal law, farther than it has ever yet been carried. If the hundred are liable in this action, the rioters are guilty of felony;* for I cannot agree with the plaintiff's counsel that the different sections of this Act are so far to be considered separately and distinctly, that the hundred are answerable for damages done by persons who are not guilty of felony within the former part of the Act. And I am most clearly of opinion that it was not a beginning to demolish or pull down the plaintiff's house within the meaning of the fourth section of the Act. The rioters who committed this outrage on the plaintiff's property are deserving of reprehension and punishment; but still they are not guilty of felony; and therefore I think that the rule to enter a nonsuit must be made absolute.

PER CURIAM:

Rule absolute.

* Vid. *Ratcliffe* v. *Eden*, Cowp. 488, 9.

1798.
Feb. 9.

[505]

PHYN AND OTHERS *v.* THE ROYAL EXCHANGE ASSURANCE COMPANY.

(7 T. R. 505—508.)

A deviation of a vessel from the voyage insured through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry.

THIS was an action on a policy of insurance on goods from London to Jamaica. The declaration contained two counts; one alleging the loss to have been by capture, the other by barratry. It appeared in evidence at the trial, before Lord Kenyon, at Guildhall, that the ship on board of which the goods were laden, sailed on her voyage from London for Jamaica; and that the captain's instructions from his owners were to proceed immediately to that island. But after the vessel had cleared the channel she was carried by strong currents and from other circumstances, out of her reckoning, until at length she was found to be between the Grand Canary and the island of Teneriffe. In this situation it was admitted that the direct course to Jamaica was to the south-west; instead of which the captain bore up for the island of Santa Cruz, which lies to the north-west in sight about thirty miles, where the vessel came to an anchor. There an embargo was laid upon her by the Spanish government, and soon after the news arriving of war having been declared between Spain and Great Britain, the vessel and cargo were afterwards condemned as prize. On the part of the plaintiffs it was contended that they were necessarily entitled to recover on one or other of the counts in the declaration; on the first if there were no deviation; or admitting that the ship's going to Santa Cruz instead of pursuing a south-westerly course to Jamaica, after the captain knew with certainty where the ship was, was a deviation, so as to preclude the plaintiffs from recovering upon the first count as for a loss by capture, still that such a wilful deviation by the captain against the directions of his owners, without any consideration of advantage to them, and merely for the sake of procuring a temporary refreshment for himself and his company, was an act of barratry upon which the plaintiffs were entitled to

recover on the second count. Lord KENYON thought that it could not be barratry without a fraudulent purpose in the captain at the time; and he left the questions to the jury with that direction, who found that the captain's going to Santa Cruz "was a deviation, and was owing either to ignorance or something else, but that it was not fraudulent;" and they accordingly found a verdict for the defendants.

A rule having been obtained calling on the defendants to shew cause why the verdict should not be set aside and a new trial had, [506]

[The question was argued by *Erskine* and *Park* for the defendants, and by *Gibbs*, *Adam* and *Giles* for the plaintiffs.]

LORD KENYON, Ch. J.: [507]

As so many observations have been made in the argument of this case on the different expressions used by the several Judges in the cases cited, I will take care not to hazard an extra judicial opinion now. I will therefore only say that as it seems admitted that there must be fraud to constitute barratry, and as the jury have expressly said that there was no fraud in this case, I am of opinion that there was no barratry, and consequently that there ought not to be a new trial.

ASHHURST, J.:

I think that we are bound by the verdict of the jury, who have negatived barratry by saying there was no fraud in the case.

GROSE, J.:

The question is, Whether this were a barratrous deviation? Now in order to see whether this were or were not barratry, I will refer to the opinion of a very able lawyer, Mr. J. ASTON, who, in the case of *Valejo* v. *Wheeler*,* said that there must be fraud or knavery to constitute barratry; "Barratry is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured." An opinion of

* Cowp. 155, 6.

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Mr. J. BULLER in *Saloucci* v. *Johnson* † has however been cited to shew that he thought that fraud was not necessary to constitute a barratry, but that is not fairly to be collected from what fell from that Judge in that case, where it was not necessary to give a definition of barratry; and in a subsequent case, *Ross* v. *Hunter*,‡ where his attention was more immediately called to this subject, he considered that barratry *could not exist without fraud; "In one sense of the word it is deviation by the captain for fraudulent purposes of his own; and that is the distinction between deviation, as it is generally used, and barratry." Therefore Mr. J. BULLER agreed with Mr. J. ASTON in thinking that fraud is a necessary ingredient in barratry. Then it was argued that this is a verdict against evidence, because the jury have found that there was no fraud: but I should doubt my own opinion on a question of fact, when put in opposition to that formed by persons who are more conversant than I am in transactions of this kind, unless it manifestly appeared by the evidence that there had been some mistake. The plaintiffs' counsel do not say that the captain did anything fraudulently for purposes of his own against the interest of his owners: and it is enough for me to say that I do not see that any fraud was committed, that we cannot presume fraud, and that the jury have negatived fraud.

[*508]

LAWRENCE, J.:

Some stress has been laid on an expression of mine in *Moss* v. *Byrom*,§ where it is supposed I gave an opinion that fraud was not a necessary ingredient in barratry, in saying "Whatever was done by the captain to defeat or delay the performance of the voyage was barratry in him, it being to the prejudice of his owners;" but what fell from me there must be taken with a reference to the case then in judgment before the Court, where there were strong circumstances to shew a criminal intention in the captain; and the words said to have been used by me must be understood thus, "Those things that were done by the captain in that case to defeat or delay the voyage, constituted

† B. R. Trin. 25 Geo. III.; Park on Insurance, 415.

‡ 2 R. R. p. 319.

§ 3 R. R. 208.

barratry," &c. There is no case that I know of, in which it was said that the act of the captain is barratry merely because it is against the interest of the owners, unless it be done with a criminal intent. In the case of *Stamma* v. *Brown*,* of which I have a manuscript note, LEE, Ch. J. in defining barratry, said, "Barratry must be some breach of trust in the master, *ex maleficio*." In this case the jury, having negatived fraud, have, in my opinion, negatived criminality in the captain; and therefore this was not a barratrous deviation.

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Rule discharged.

FOWLER *v.* PADGET.

(7 T. R. 509—517.)

1798. *Feb.* 8.

[509]

Actus non facit reum nisi mens sit rea is a principle applicable to bankruptcy law. Having regard to this principle, the word "or" in the stat. 1 Jac. I. c. 15, must be read as if it were "and," so that in order to constitute an act of bankruptcy by a trader in departing from his dwelling-house, it is not alone sufficient that a creditor should be thereby delayed, but the departure must also have been with that intent.

TRESPASS for breaking and entering the plaintiff's dwelling-house at Manchester, and taking and converting his goods. The defendants justified under the bankrupt laws, and the only question was, Whether the plaintiff had committed an act of bankruptcy. At the trial before Rooke, J. at the last Lancaster assizes, it appeared that the plaintiff, who was a trader at Manchester, having received intelligence that one Smith in London, who was indebted to him to a large amount, was in a failing condition, left his house early on the 17th April, and went to London for the purpose of arranging his affairs with Smith, and getting security for his demand. That having received of Smith goods of a considerable value and a bill of exchange for 129*l.* he returned to Manchester after an absence of ten days; during which time several creditors called at his house at Manchester for payment of their respective debts, which were not satisfied, the bankrupt not having made any provision for them, nor left any person in charge to conduct his business during his

* 2 Str. 1173.

FOWLER v. PADGET.

absence. Among these creditors were the holders of several bills, which became due on the day after his departure, and whom he expected to call on him for payment. After his return to Manchester some of his creditors compounded with him and received 10*s.* in the pound: but a commission of bankrupt was taken out against him by the defendant and his partner. The jury found a verdict for the plaintiff for 27*l.* declaring in answer to a question put to them by the learned Judge, "that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors; but that delay did actually happen to some creditors."

A rule was obtained in the last Term calling on the plaintiff to shew cause why the verdict should not be set aside and a new rule had.

[After argument:]

[513] LORD KENYON, Ch. J.:

This is a question of infinite importance, and therefore I wished that the parties would have consented † to put it on the record, in order that it might be finally decided by the court of dernier [*514] resort. If there had been no decision *on this subject, I should have thought very little doubt could have been entertained on the construction of the Act of Parliament. Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea.*‡ The intent and the act must both concur to constitute the crime; and by reading the word "and" for "or" in the statute of 1 Jac. I. c. 15,§ which is frequently done in the construction of legal instruments

† In the course of the argument, the Court expressed a wish that the parties would consent to state the facts of the case on a special verdict; but this was not agreed to, on account of the smallness of the sum in dispute, and the situation of the plaintiff.

‡ This principle is referred to and applied in the case of *Reg.* v. *Tolson*, a case of bigamy (1889) 23 Q. B. D. 6 8, 176, 58 L. J. M. C. 97. Compare, however, the case of *Reg.* v. *Prince* (1875) L. R. 2 C. C. 154, 165, 44 L. J. M. C. 122, a case of abduction under 24 & 25 Vict. c. 100, s. 55, where the principle is maintained by BRETT, J. who was in the minority.—R. C.

§ This point is referred to in the opinion of Lord HALSBURY (L. C.) in *Mersey Docks, &c.* v. *Henderson* (1888) 13 App. Ca. 595, 602, 58 L. J. Q. B. 152.—R. C.

where the sense requires it, all difficulty will be removed. But according to the defendant's construction of this Act, every merchant in London might become a bankrupt before to-morrow morning. If the words of the statute are to be taken in their literal sense, any person who happens to go from home only for an hour, during which time any creditor calls for payment, and is for that hour delayed, may become a bankrupt: and it would be no answer to such an argument (as was supposed at the bar) to say that the trader left word where he was gone, because a creditor may have taken out a writ against him in one county, and if he were gone on the borders of the next county, such creditor would in fact be delayed. I do not wish to impeach the authority of *Woodier's* case † or of that of *Raikes* v. *Poreau*,‡ because in both, the parties went abroad under circumstances that rendered it highly probable that they would not return to this country; one had committed murder, and the other was amesnable to the laws of this country for a different offence. We have been pressed however with another case, that of *Vernon* v. *Hankey*,§ tried before Mr. J. BULLER: I have the greatest respect and reverence for the opinions of that learned Judge, but I rather think we have another opinion of his‖ to set against that delivered by him in *Vernon* v. *Hankey*, where he said that this intention with which the party left his house was to decide the question, and I think that was the better opinion. The Legislature never could have meant to extend criminality to a person who leaves his house, only for the purpose of transacting his legal concerns. I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for by the defendant. And as this verdict was taken * on the ground that the plaintiff had not committed an act of bankruptcy, I am not prepared to say that there ought to be a new trial. [*515]

ASHHURST, J.:

As different opinions have been entertained in the different

† Bull. N. P. 39.

‡ Co. Bank. L. 73, 4th ed.

§ London Sittings after Trin. 27 Geo. III., Co. Bank. L. 95.

‖ In *Aldridge* v. *Ireland*, which Mr. J. LAWRENCE read from his note-book in the course of the argument.

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cases on this subject, I think we ought to adopt that construction which will be attended with the least inconvenience. The rule of construction contended for by the defendant is a most severe one: if that were to obtain, any trader who left his house with the intention of benefiting his creditors might become a bankrupt, if any one of his creditors were thereby delayed, even for an hour; that rule might affect the richest man in the kingdom. But if the word "or" in the Act be construed to mean "and," then the rule will be a reasonable one. And this construction seems consonant to the decisions on another part of this statute; for if a trader begin to keep house, and give orders to be denied to his creditors, it has been decided that that is not an act of bankruptcy, unless in point of fact he be denied to a creditor. This shews that the intent and the act must concur in order to constitute an act of bankruptcy.

GROSE, J.:

In deciding this case we ought to consider the spirit as well as the letter of the Act of Parliament on which this question arises. The Legislature in framing it, seem to have had in view those persons who did certain acts, which shewed that they knew their creditors would be defeated or delayed, and those who avoided their creditors either by keeping house or leaving their home, with intent to delay their creditors. And this construction of the Act is not impeached either by *Woodier's* case or by that of *Raikes* v. *Poreau*, for there the parties must have known that their creditors would necessarily be delayed, by the steps they took. But in this case so far from the plaintiff's having any intention to delay his creditors, the jury expressly found that he had no such intention, nay that his intention was laudable, for it appeared that he went from home for the purpose of obtaining money, to prevent his creditors being delayed. To say that this was an act of bankruptcy, merely because some of the plaintiff's creditors were unintentionally delayed by an act intended for their benefit, would be a most severe determination, especially in a case where we are called upon to grant a new trial against the justice of the case. I do not mean to say that this is not a point of some difficulty,

and certainly it is a question of great consequence: but as these parties are not equal to the expense of a special verdict, I *am not disposed to grant a new trial, particularly when we consider that the question will probably come back again here in the same shape, on a motion for a new trial.

FOWLER v. PADGET. [*516]

LAWRENCE, J.:

If there had been no decision on this Act of Parliament, I should have thought that the true way of construing it would be to read "and" for the word "or," and then all difficulty would have been avoided. But as some of the cases seem to have proceeded on the ground, that the statute must be read in the alternative, and that a trader may become a bankrupt by doing the acts there enumerated, if in point of fact his creditors be thereby delayed, whatever may have been his intention, it seems to me that this question deserves great consideration. I think that *Woodier's* case, and the case of *Raikes* v. *Poreau* might have received the same determination, though on a different ground; for though it was not the immediate object of the parties in those cases to delay their creditors by going abroad, yet as that must be the necessary consequence of such an act, it would be evidence of their intending to delay or defeat their creditors, and so it would come within the construction of the statute now contended for by the plaintiff. However those cases seem to have been determined on the ground, that the fact of delay in consequence of going abroad, was sufficient to constitute an act of bankruptcy; and therefore I wished that the question might be put on the record. But it would answer no purpose to grant a new trial in this case, because as the parties will not consent to have a special verdict, probably the case will come to us again (as my brother GROSE has observed) in the same form.

Rule discharged.

On the next day Lord KENYON, Ch. J. said that he had met with several authorities in support of the opinion he had given in this case. In *Maylin* v. *Eyloe*, 2 Str. 809, it seems to have been taken for granted that the word "or" in the statute meant

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"and," for the words of the statute are thus printed, "departing from his house, with intent *and* whereby his creditors may be defeated," &c., and they are printed in italics. In *Lingwood* v. [*517] **Eade*, 1 Atk. 196, Lord HARDWICKE also thought that, to constitute an act of bankruptcy by the trader's leaving his house, it was necessary that he should go with intent to delay or defeat his creditors; for speaking of the opinions of Lord Ch. J. LEE, and of Lord Ch. J. WILLES, given on two trials before them, he approved of the distinction taken by the latter, saying "he was very well warranted by the words of the statute in the distinction he made between absconding to avoid a debt, and absconding to avoid a duty only. And in 1 Bac. Abr. title "Bankrupt," (A), which was written by Lord Ch. B. GILBERT, that great Judge speaking of the stat. 13 Eliz. c. 7, and 1 Jac. I. c. 15, said the latter was merely a transcript of the former, with the following addition only, "or fraudulently procures his goods to be attached or sequestered, or makes any fraudulent grant of his land, &c., to the intent that his creditors may be defrauded, shall be adjudged a bankrupt."

1798. *Feb.* 10.

POSTELL *v.* WILLIAMS.

(7 T. R. 517.)

[517]

If a defendant be sent out of the kingdom under the alien bill after he has given a bail bond, and before the return of the writ, the Court will order the bail bond to be delivered up to be cancelled, on the ground that performance of the condition has become impossible by an act of the government under a statute.

THE defendant having been sent out of the kingdom under the alien bill after a bail-bond was given but before the return of the writ, a motion was made on behalf of the bail, that the bail-bond might be delivered up to be cancelled.

Garrow, who now shewed cause against that rule, said that no motion could be made until bail above was put in, and that then the motion should be only to stay the proceedings; for that if the defendant were to be suffered to return to this country, the bail ought to be responsible.

Bayley in support of the rule: POSTELL v. WILLIAMS.

The bail to the sheriff cannot put in bail above: for the form of the recognizance is that the person of the defendant is delivered over to the bail: but that is now become impossible by an act of the government under the alien bill, the defendant having been sent out of the kingdom. Besides if they could put in bail above, it would be a nugatory step, since they might apply to the Court the next instant to enter an exoneretur on the bail-piece, and not merely to stay the proceedings. *Merrick* v. *Vaucher*, 6 T. R. 50.

The COURT were of this opinion, and made the

Rule absolute.

CALVERT *v.* BOVILL.

(7 T. R. 523—527.)

1798. *Feb.* 10.

[523]

In an action on a policy of insurance on goods warranted American, on board a ship from London to Virginia, a sentence of a foreign Court, which after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired and loaded at London, and having on board eighty barrels of gunpowder, declares the ship and cargo a good prize," is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion.

THIS was an action on a policy of insurance on the captain's goods and private adventure, warranted American property, on board the ship *Friends*, at and from London to Virginia.

It was clearly proved at the trial that the property of the goods (which were shipped pursuant to an order of council, then rendered necessary) was in the plaintiff; that he was an American; that the ship, which was American built, and manned by American sailors, had been consigned by her owners in Virginia to their correspondents in London, with a cargo of merchandize, and was afterwards cleared out and sailed from London upon the voyage insured, having all necessary papers on board to evince that she was an American ship, and that the real place of her destination was Norfolk, in Virginia, to which port she belonged. That in the *course of her voyage having met with very tem- [*524]

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pestuous weather, and being much damaged, she was obliged from distress to bear away for the first port in the West Indies, in which course she was captured by a French privateer and carried into Guadaloupe, where she was condemned by sentence of the Court there, expressed, as to the matter in judgment, in these terms; "Seen by us, the Judges of the Court of Commerce, the papers which have been here produced respecting the capture of the brig *Friends*, Captain Thomas Calvert, made by the privateer *La Legere*, Captain A. T., and having heard on that subject the opinion of citizen Serand, commissary of the Executive Directory of the said Court, and also heard the report, and considered the whole; forasmuch as the true destination of the said vessel was for the English islands, having been hired and loaded at London, and that there has been found on board her eighty barrels of gunpowder;† the Court declares the said brig *Friends*, a good prize for the benefit of the captors, together with her tackle, apparel, cargo, and generally all that belongs to her," &c.

The sole question was, Whether the sentence of condemnation was conclusive evidence against the warranty of the goods being American property? A verdict was taken for the plaintiff, with liberty for the defendant to move to set it aside and enter a nonsuit, if the Court should be of opinion that the sentence was conclusive; which motion having been accordingly made, and a rule nisi obtained,

[After argument:]

[526] LORD KENYON, Ch. J.:

That the justice and honesty of the case are with the plaintiff, is beyond all doubt; and that the ship was American, and the goods the property of an American is equally clear: but it is contended that though in point of fact the goods were the property of an American, the sentence of condemnation precludes the plaintiff from asserting that fact. I yield to the cases cited, which shews that to a certain degree this Court will support the

† This was part of the captain's adventure, the rest consisting of slops, porter, cheese, and ship chandlery.

proceedings in foreign courts by presuming that their sentences are just; and I will not make any exception at present of the proceedings of the French Courts of Admiralty. But when an attempt is made to pervert the justice of the case, it becomes necessary for us to see whether the decision of the Court at Guadaloupe has so determined on the fact of neutrality, that we cannot examine into it. But it has been said, as nothing can justify the sentence of the French Court of Admiralty but the fact that this was British property, we must conclude that they condemned the ship and cargo on the ground that they were British property: but that is a conclusion against all the facts proved in the case. If indeed that court had stated in their sentence that they condemned the goods because they were British property, I should have considered myself bound by their sentence, but they have assigned other reasons for their adjudication: the express grounds of the sentence of condemnation are that the ship was destined for one of the West India islands, that she was hired and loaded at London, and that she had a certain quantity of gunpowder on board, therefore they condemned her and her cargo as good prize. Then it is impossible for us to conclude that the French court decided on the ground that this was British property, when all the evidence in the cause and the reasons expressly given by them for their judgment, lead to a contrary conclusion.

ASHHURST, J. declared himself of the same opinion.

LAWRENCE, J.: [527]

It is said that whatever is adjudged by the sentence of the foreign court, is conclusive on the parties, however unjustly they may have decided: but it is sufficient to say that in this case they have not decided that fact on which the defendant relies. If that court had condemned the goods because they were the property of an enemy, that judgment would have been conclusive here; but, so far from the French Court at Guadaloupe having decided that fact, they have expressly given other reasons for their sentence. The cases alluded to in the argument seemed to establish this, that if we can collect from the sentence itself on

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what ground the foreign court decided, that is conclusive in any action brought in this country:* but if it be ambiguous and does not appear on the face of the sentence on what ground they proceeded, then we may receive evidence to shew what were the grounds of the decision abroad.

Per CURIAM: *Rule discharged.*

* The class of cases here referred to have been severely criticised. See Phillips on Insurance, § 2109; *Donaldson* v. *Thompson* (per Lord ELLENBOROUGH, 1 Camp. 431.) And, indeed, it is difficult to see on what principle the facts found as the ground of a foreign judgment can be conclusive in a question with a third party (the insurer) and for a collateral purpose. The decisions referred to culminate (as observed in the judgment of the Court of Appeal in *De Mora* v. *Concha* (1885) 29 Ch. D. 268, 301) in *Lothian* v. *Henderson*, in the House of Lords (3 Bos. & P. 499, reported *in loco post*); and Lord ELLENBOROUGH himself accepted that judgment as settling, so far as relates to an English court of law, the doctrine that the sentence of a foreign prize court is conclusive evidence of the facts upon which they have professed to decide judicially in a subsequent action upon a policy of insurance (*Bolton* v. *Gladstone*, 5 East, 155, 160). But the opinion of Lord ELDON, as well as that of Lord ALVANLEY, in *Lothian* v. *Henderson*, admits the doctrine to be anomalous, and perhaps founded on a mistake. They defend it on the ground of a settled practice—importing, as it might perhaps be said, an implied term into the warranty in the policy. At all events, as adjudged in *Lothian* v. *Henderson*, the doctrine may be excluded by express contract. And the judgment of the Court of Appeal, as well as *Mr. Rigby's* argument, in *De Mora* v. *Concha*, is instructive to show that the doctrine is not to be extended into any general principle.

As the class of cases now referred to will occupy some space in the Revised Reports, it seems convenient at the outset to point out that this is not on account of any general principle involved in them; but on account of their importance to the large interest of British insurance.—R. C.

K. B. EASTER TERM.

DOE, ON THE DEMISE OF CANDLER AND OTHERS *v.* SMITH.

1798. *April* 27.

(7 T. R. 531—534.)

[531]

Under a devise to A. and the heirs of her body for ever as tenants in common, and not as joint tenants, and in case A. die before twenty-one or without leaving issue of her body then to B.; held that A. took an estate tail.

THIS was an ejectment for certain lands in Kirby Malzeard in Yorkshire, on a joint demise by H. Candler the younger, Anna Bella Candler and Mary Candler, and also on the separate demises of those three persons; and on the trial a special case was reserved for the opinion of this Court.

W. Ascough, being seised in fee of the premises in question, by his will duly executed, dated 17th June, 1775, after giving to his wife an annuity to be issuing out of his freehold estate, devised the same as follows: "I hereby give and devise all my freehold messuages land, &c. (subject to the payment along with my personal estate of all my debts legacies and funeral expenses) unto my daughter Mary Ascough and the heirs of her body lawfully to be begotten for ever, as tenants in common and not as joint tenants, and in case my said daughter shall happen to die before twenty-one, or without leaving issue on her body lawfully begotten, then I give and devise all those my said freehold *messuages lands, &c. to R. Ascough his heirs and assigns for ever." Mary Ascough having attained her age of twenty-one years intermarried with H. Candler, and they have issue three children, viz. Henry, Anna Bella, and Mary Candler, who are the lessors of the plaintiff, and were all living at the time of levying the fine and executing the feoffment hereinafter mentioned. In Trinity Term, 1796, H. Candler and Mary his wife levied a fine *sur conusance de droit come ceo*, &c. of the premises in question, and by deed of feoffment dated the 1st of January, 1797, with livery of seisin thereon, conveyed the same,

[*532]

DOE v. SMITH.

and declared the uses of the fine to the defendant J. Smith and his heirs for ever.

The questions reserved for the consideration of the Court are, Whether Mary the wife of Henry Candler the elder, took an estate tail in the premises above mentioned, to be conveyed to the defendant, or an estate for life only? and Whether the plaintiff is entitled to recover on the demises above stated?

[After *Holroyd* had been heard for the plaintiff,]

[533] *Chambre, contrà*, was stopped by the Court.

LORD KENYON, Ch. J.:

It is a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of *Robinson* v. *Robinson* * first in this Court and afterwards in the House of Lords, that where it appears in a will that the testator had a general intention and also a secondary intention, and they clash, the latter must give way to the former. In that case beyond all doubt, the testator meant that the first taker should take only an estate for life, because he said so in express terms: but as it appeared that this was inconsistent with his general intent, as expressed in the subsequent parts of the will, it was determined both by this Court and by the House of Lords, that the first taker (L. Hicks) should take an estate tail in order to effectuate the devisor's general intent, notwithstanding the words of the will were "to L. Hicks for and during the term of his natural life and no longer." The case of *Doe* d. *Long* v. *Laming*, † which has been referred to, is distinguishable from the present; for there were words of limitation superadded to the "heirs of the body" of the first taker. In giving my opinion on this case, I cannot do better than repeat what was said by Mr. J. WILMOT in *Roe* d. *Dodson* v. *Grew*, ‡ where the words of the devise were "to G. Grew for life, and after his decease to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male, and for want of such issue male then to G. Dodson, his heirs and assigns for ever;" only pre-

* 1 Burr. 38. † 2 Burr. 1100. ‡ 2 Wils. 323.

mising that in this case the devise is *" to his daughter M. Ascough, and the heirs of her body lawfully to be begotten for ever as tenants in common, and not as joint tenants, and if his said daughter should happen to die before twenty-one, or without leaving issue on her body, then to R. Ascough, his heirs and assigns for ever:" here are no words of limitation added to the estate given to the children (supposing they took as purchasers), and yet the remainder over is not to take effect until there was a general failure of her issue, so that there must be an estate to comprehend all her children for ever. In that case WILMOT, J. said † "The intention of the testator clearly was to give G. Grew an estate for life only, but his intention also clearly was that all the sons of G. Grew should take in succession: both these intentions cannot take place; for if the devisee G. Grew, took only an estate for life, his sons could never have taken; and although it eventually happened that he had no sons, yet we must consider this case as if he had had issue. Therefore to enable the sons of G. Grew to take, G. Grew must be adjudged to have been tenant in tail; for the testator's great intention most clearly was, that the lands should never go over to the lessor of the plaintiff in remainder, but upon a failure of issue of G. Grew." The general proposition that I stated at first, is supported by this case, which was in a great measure founded on what had been before decided in the case of *Robinson* v. *Robinson*. I admit that in this case the testator intended that his daughter M. Ascough should only take an estate for her life, and that her children should take as purchasers: but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations; now the latter intention cannot be carried into effect unless M. Ascough takes an estate tail. In order therefore to give effect to the devisor's general intention, according to the fair construction of the will, M. Ascough must take an estate tail.

Per CURIAM: *Postea to the defendant.*

† His Lordship read a manuscript note of this case, but in substance it agreed with the report in Wilson.

1798.
April 28.

[536]

THE KING *v.* MORDECAI HYMEN.

(7 T. R. 536.)

When a statute creates a penalty and says that one moiety shall be to the use of the King and the other to a common informer, the King may sue for the whole unless a common informer has commenced a *qui tam* suit for the penalty.—In such a case the King may recover the penalty by an information filed by the *Attorney-General* in this court.

THIS was an information by the *Attorney-General* against the defendant for a penalty of 500*l.* under the statute 24 Geo. III. st. 2, c. 47, s. 32, which enacts that "If any person shall give offer or promise to give any bribe, recompense or reward to, or make any collusive agreement with any officer of the navy, customs or excise, to do, conceal or connive at any act whereby any of the provisions made by this, or any other Act of Parliament relative to his Majesty's customs or excise may be evaded or broken, every such person shall for each offence (whether the same offer, proposal, promise or agreement be accepted or performed or not) forfeit the sum of 500*l.*" The information also contained counts at common law for bribing the officer of the customs.

The defendant having been convicted, a doubt arose whether the King could sue for the whole penalty,* and if he could, whether it should not be by a prosecution in the Exchequer, and the matter stood over until this day.

The counsel for the prosecution now stated that there were many precedents in the Crown-Office of similar proceedings; that though in *R.* v. *Clark* and others,† which was an information by the *Attorney-General* for a penalty against the defendants, for assaulting and resisting custom-house officers in the execution of their duty, on the stat. 8 Geo. I. c. 18, s. 25, several objections were taken in arrest of judgment, this objection was not mentioned, and judgment was given against the

* By the 38th sect. of the stat. 24 Geo. III. c. 47, it is enacted that one moiety of the several penalties in the Act mentioned shall be to the use of his Majesty, his heirs and successors, and the other moiety to the use of such person as shall inform, prosecute or sue for the same; and that the penalties may be sued for in any of his Majesty's courts of record at Westminster.

† Cowp. 610.

defendants; and that in Com. Dig. title "Information," (A. 3), it is said, "Where a statute gives a penalty to the King and to him who will sue for it; if the King has not exhibited an information, any common informer may," evidently implying that a common informer cannot sue if the King has already exhibited an information for the penalty.

The COURT, being satisfied with these authorities, ordered the defendant to pay the whole penalty.

Mingay, *Law*, *Garrow*, and *Dampier* for the Crown.

Erskine for the defendant.

DOE, ON THE DEMISE OF MEARS, *v.* DOLMAN AND OTHERS.

1798. *May* 11.

(7 T. R. 618—620.)

[618]

The Court will grant leave to enter the continuances after verdict in order to arrive at the justice of the case.

AT the trial of this ejectment, a verdict was taken *pro formâ* for the plaintiff, with liberty to the defendant to move to set it aside and enter a nonsuit; which motion was accordingly made and a rule *nisi* granted on a former day in this Term on two grounds; 1st, That the lessor's right of entry was barred by the Statute of Limitations;* 2ndly, By a descent cast.

The first objection (the only one in question at present) arose on the evidence given at the trial, whereby it appeared that Mary Mears, the grandmother of the lessor of the plaintiff, and sister to Thomas Dolman, from whom both parties claimed, died on the 25th January, 1771, and that afterwards, in the spring of the same year, Thomas Dolman died, upon whose death the title of the lessor of the plaintiff accrued, if at all, as heir at law; which was above twenty years ago. The defendant claimed as grandson and heir at law of that Thomas Dolman. But it was shewn that that Thomas Dolman had a former wife living at the time

* 21 Jac. I. c. 16.

DOE
r.
DOLMAN.

of his marriage with the defendant's grandmother, and therefore the defendant's father being a bastard, could not take by descent. The lessor of the plaintiff, in an answer to the objection to his own title to recover on account of the Statute of Limitations, proved that he was an infant at the time when his title accrued and had not come of age till 1786, after which he had ten years to bring his action; to which the defendant objected that the action was not brought within the ten years, and adverted to the *nisi prius* record, the memorandum of which was of Hilary Term, 1798. Lord KENYON, at the trial, assented to the objection,
[*619] unless it could be shewn that *the writ was sued out before the expiration of the ten years and the suit continued down to the present time, which the lessor of the plaintiff was not then prepared to do: however it was agreed that the verdict should be taken for him without prejudice, with leave to the defendant to move as above.

But pending that rule, another rule was obtained, calling on the defendant to shew cause why the lessors of the plaintiff should not be at liberty to amend the plea-roll and record of *nisi prius* by making them of Easter Term, 1792, instead of Easter Term, 1797. This rule was obtained upon an affidavit stating the service of the declaration in ejectment in this cause, which was commenced by original on some of the defendants, namely, the tenants in possession, on the 22nd of March, 1792; that Dolman and the rest of the defendants (who stood on the same interest) in Easter Term, 1792, obtained the usual rule for making them defendants as landlords; and that all the defendants afterwards in the same Term, entered into the common rule to confess, &c.; and then stating the rest of the proceedings in the same suit regularly down to the time of trial. Against this last mentioned rule for amending,

[After argument by *Erskine* and *Lawes* for the defendant:]

[620] *Gibbs, contrà*, was stopped by the Court.

LORD KENYON, Ch. J.:

The only question here is whether the lessor of the plaintiff

has actually commenced the present suit in time. In what manner that is hereafter to be made out, it is unnecessary at present to inquire. The action was commenced against the casual ejector by original, and notice of the declaration was served on the tenants in possession, and the landlord was afterwards admitted to defend upon entering into the common rule. Perhaps there may be some difficulty as to the form in which the continuances shall be entered so as to bind the real parties now before the Court; though I conceive, if it were necessary, that the Chancellor would issue an original writ applicable to them. But it is sufficient in this case to say, that there is no instance in which the Court have refused the parties leave to amend according to the truth of their case, to prevent their being barred by the Statute of Limitations for a supposed laches of which they really have not been guilty. It is a matter of course to grant leave to amend in these cases, to enable the parties to arrive at the real justice of the case. And in this instance, I do not see that the defendant stands in a more meritorious situation than the lessor of the plaintiff.

DOE v. DOLMAN.

Per CURIAM: *Rule absolute to amend.*

BECKFORD *v.* HOOD.

(7 T. R. 620—629.)

1798. *May* 11.

An author whose work is pirated may maintain an action on the case against the offending party, although the work is not entered at Stationers' Hall, in accordance with the stat. 8 Ann. c. 19.* [620]

THIS was an action upon the case for piracy of copyright.

The plaintiff was the author of a book entitled "Thoughts upon Hunting;" and in May, 1781, he published the first edition [621]

* The Act of Anne was repealed by 5 & 6 Vict. c. 45, which, by sections 13 and 24 made the entry at Stationers' Hall a condition precedent of the right to sue. But the case of *Beckford* v. *Hood* is still important as an authority to show that the existence of the copyright is not dependent upon compliance with the requirements of the statute. *Goubard* v. *Wallace* (1877) 36 L. T. 704. The case has also been referred to as an authority upon the construction of a statute, as to whether a penalty is the only remedy for breach of a statutory duty. See *Vallance* v. *Falle* (1884) 13 Q. B. D. 109, 110, 35 L. J. Q. B. 459.—R. C.

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of it, without any name prefixed to the title page. In 1782 he published a second edition, and in 1784 a third edition with his name prefixed to the title page. Neither the original or subsequent editions were ever entered in the hall of the Company of Stationers. In August, 1796, the defendant published the same work under the title of "Thoughts upon Hare and Fox-hunting," with the plaintiff's name prefixed to the title page. The plaintiff is still living, and never disposed of his right or interest in the said work. The question was, Whether the plaintiff was entitled to recover in the action?

Reader, for the plaintiff:

Three questions arise in this case; 1st, Whether an action on the case for damages will lie since the stat. 8 Ann. c. 19? 2nd, Whether, if such action will lie since the statute, it can be maintained unless the work be entered at Stationers' Hall
[*622] previous to the publication? 3rd, Whether the plaintiff *has abandoned his right of property in the work by publishing it without affixing his name to it? 1st, Admitting that since the case of *Donaldson* v. *Becket*, in Dom. Proc. 1774 † an author cannot after publication of his work, set up a common law right to the exclusive printing and republishing of it, yet such a right is expressly vested in him by the stat. 8 Ann. c. 19 for the term therein specified, which is not yet expired in the present case. * * There is no case where it has been holden that if a statute vest a right generally in any person, and also give a penalty against those who infringe that right, the party grieved is confined to that particular remedy. On the contrary it was
[*623] holden in *Chapman* v. **Pickersgill* ‡ that the common law remedy of an action on the case for damages lies for maliciously suing out a commission of bankrupt, although the 5 Geo. II. c. 30, s. 23, gives a particular remedy in that case, namely, by enabling the Chancellor, to whom a bond in the penalty of 200*l.* is given for securing the trader against that mischief, to order satisfaction to the party grieved. * * Mr. Justice YATES, who in the case of *Millar* v. *Taylor* § in this Court was alone of opinion that

† 4 Burr. 2408, and 7 Bro. P. C. 88. ‡ 2 Wils. 145. § 4 Burr. 2380.

an author had not a right of property at common law in his works when published, was yet decidedly of opinion that by the first clause of the statute of Anne, an exclusive right was vested in the author *during the terms therein limited; and that notwithstanding the penalties and confiscation given by the same Act the author had all the common law remedies for the enjoyment of that right; for which he cited *Ewer* v. *Jones*, Salk. 415, and 6 Mod. 26. So in the subsequent case of *Donaldson* v. *Becket*,† EYRE, B. who gave his opinion in the House of Lords against the common law right of an author after publication, was yet of opinion that there might be a remedy in equity, upon the foundation of the statute independently of the terms and conditions thereby prescribed in respect of the penalties given. * * 2ndly, It is not necessary to the author's right of action in this case that the work should be entered at Stationers' Hall previous to publication. It is true that the second section of the Act requires such entry to be made in order to subject a defendant to the forfeitures or penalties of the Act; but it is only necessary for that purpose. And there was no occasion to give notice to the defendant who the author was in order to sustain this action, because he must have known that the copyright did not belong to him; and he admits his knowledge of the author, by prefixing his name to the work published by himself. 3rdly, There is no pretence for saying that the plaintiff by publishing the work originally without his name thereby abandoned his right of property to the public; for whether he did so or not is a matter of fact which should have been found by the jury, and cannot be inferred as a matter of law: and here the case states that the plaintiff never disposed of his right or interest in the work. * * *

[*624]

Marryat for the defendant:

It is admitted that this action is not maintainable at common law, independently of the statute: if so, that statute having pointed out a particular remedy no other can be pursued. It is a settled rule that where a statute creates a *new offence or gives a new right, and in the same clause either prescribes a particular mode of punish-

[*625]

† 4 Burr. 2409.

BECKFORD v. HOOD.

ment or a particular remedy for the infringement of it, no other can be resorted to. But it is otherwise where a statute is merely confirmatory of a pre-existing right; in which case the new remedy is considered only as accumulative. * * As to the case cited from
[*626] 2 Wils. 145, *that went expressly on the ground that the action would have lain at common law supposing the statute had never been made, and therefore that the remedy given by the statute was accumulative. And indeed it could not be doubted but that a party was entitled to remedy in damages for any injury to his character or fortune, let it arise from what cause it might. The 2nd objection is much stronger. The whole frame of the Act shews that the Legislature intended to make it part of the condition of giving the exclusive right to authors to print their works for the times mentioned, that they should enter them in some public record, in order that all persons might be apprized what works they might or might not publish. This appears strongly from the third clause, which provides that if the clerk of the Stationers' Company shall not on demand, register the copy, the author upon notice thereof in the Gazette shall have the same benefit as if the entry had been made. This shews that the Legislature considered the penalties before given in the nature of a remedy to the author, and not merely for the benefit of a common informer; for that provision is exclusively in favour of the author. But this mode which is substituted in lieu of the other was still required for the purpose of notifying to the public the name of the author asserting his exclusive right, and as a warning to others not to offend against it. In *Donaldson* v. *Becket* in the House of Lords, the majority of the judges who delivered their opinions thought that since the statute of Anne, the author had no other legal remedy than that given to him by the statute upon the terms and conditions therein prescribed, one of which is that the work shall be entered. 3rdly, The work being originally published without the author's name, and not being entered at that time, must be considered as evidence of his intention to abandon it to the public; and upon a special case, the Court are substituted for the jury as to the conclusions to be drawn from the facts stated. And though it is said that the defendant knew the author by publishing his name to the

pirated work, yet he could not know whether he were living or where he was to be found.

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Reader, in reply, observed that the opinion of the majority of the judges in *Donaldson* v. *Becket* did not proceed upon the specific remedy which the party had under the statute, but merely as to his right of property being confined to that given to him by the statute, as contradistinguished from the common law.

LORD KENYON, Ch. J.: [627]

All arguments in support of the rights of learned men in their works, must ever be heard with great favour by men of liberal minds to whom they are addressed. It was probably on that account that when the great question of literary property was discussed some judges of enlightened understanding went the length of maintaining that the right of publication rested exclusively in the authors and those who claimed under them for all time: but the other opinion finally prevailed, which established that the right was confined to the times limited by the Act of Parliament. And that I have no doubt was the right decision. Then the question is, whether the right of property being vested in authors for certain periods, the common law remedy for a violation of it does not attach within the times limited by the Act of Parliament. Within those periods the Act says that the author shall have the sole right and liberty of printing, &c. Then, the statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it. Of this there could have been no doubt made, if the statute had stopped there. But it has been argued that, as the statute in the same clause that creates the right, has prescribed a particular remedy, that and no other can be resorted to. And if such appeared to have been the intention of the Legislature, I should have subscribed to it however inadequate it might be thought. But their meaning in creating the penalties in the latter part of the clause in question certainly was to give an accumulative remedy: nothing could be more incomplete as a remedy than those penalties alone; for without dwelling upon

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the incompetency of the sum, the right of action is not given to the party grieved, but to any common informer. I cannot think that the Legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded, without redress. But there was good reason for requiring an entry to be made at Stationers' Hall, which was to serve as notice and warning to the public, that they might not ignorantly incur the forfeitures or penalties before enacted against such as pirated the works of others: but calling on the party who has injured the civil property of another for a remedy in damages cannot properly fall under the description of a forfeiture or penalty. Some stress was attempted to be laid on the Acts passed for preserving the property of engravers in their works, in which a special provision is made to meet *such a case as the present, and to give the same right of action as is here contended for. But it is well known that provisions of that kind are frequently inserted in Acts of Parliament *pro majori cautelâ*; and no argument can be drawn from them to affect the construction of other Acts of Parliament. On the fair construction of this Act, therefore I think it vests the right of property in the authors of literary works, for the times therein limited, and that consequently the common law remedy attaches, if no other be specifically given by the Act; and I cannot consider the action given to a common informer for the penalties, which might be pre-occupied by another, as a remedy to the party grieved within the meaning of the Act.

[*628]

ASHHURST, J.:

In the case alluded to of *Donaldson* v. *Becket* in the House of Lords, I was one of those who thought that the invention of literary works was a foundation for a right of property independently of the Act of Queen Anne. But I shall not enter into the discussion of that point now, as the question in the present case is much narrowed. And upon the construction of that Act I entirely concur with my Lord that, the Act having vested the right of property in the author, there must be a remedy in order to preserve it. Now I can only consider the action for the penalties given to a common informer as an additional pro-

tection, but not intended by the Legislature to oust the common law right to prosecute by action any person who infringes this species of property, which would otherwise necessarily attach upon the right of property so conferred. Where Act of Parliament vests property in a party, the other consequence follows of course, unless the Legislature make a special provision for the purpose; and that does not appear to me to have been intended in this case. I am the more inclined to adopt this construction, because the supposed remedy is wholly inadequate to the purpose. The penalties to be recovered may indeed operate as a punishment upon the offender, but they afford no redress to the injured party; the action is not given to him, but to any person who may get the start of him and sue first. It is no redress for the civil injury sustained by the author in the loss of his just profits.

GROSE, J.:

The principal question is whether within the periods during which the exclusive right of property is secured by the statute to the author, he may not sue the party who has invaded his right for damages up to the extent of the injury sustained; *and of this [*629] I conceive there can be no doubt. In the great case of *Millar* v. *Taylor*, Mr. Justice YATES gave his opinion against the common law right contended for in authors; but he was decisively of opinion that an exclusive right of property was vested in them, by the statute for the time limited therein. No words can be more expressive to that effect than those used by him. But it is to be observed that the penalties given by the Act attach only during the first fourteen years of the copyright: and during that time only is the offender liable for such penalties if he invade the author's right: but he is liable during the whole period prescribed by the Act, to make good in an action for damages, any civil injury to the author. If this construction were not to prevail, during the last fourteen years of the term, the author would be wholly without remedy for any invasion of his property. But there must be a remedy, otherwise it would be in vain to confer a right. I was at first struck with the consideration, that six to five of the judges who delivered their opinions in the House of

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Lords in the case of *Donaldson* v. *Becket*, were of opinion that the common law right of action was taken away by the statute of Anne; but upon further view, it appears that the amount of their opinions went only to establish that the common law right of action could not be exercised beyond the time limited by that statute.

LAWRENCE, J.:

I entirely concur with the opinions delivered by my brethren, upon the principal point, and the case of *Tonson* v. *Collins*, 1 Blac. Rep. 330, is an additional authority in support of it; for there Lord MANSFIELD said that it had been always holden that the entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalty, but that the property was given absolutely to the author, at least during the term.

Postea to the plaintiff.

1798. *May* 15.

LORD GWYDIR AND OTHERS *v.* FOAKES.

(7 T. R. 641—651.)

[641]

A grant of all tithes arising out of or in respect of farms, lands &c. includes the tithes arising out of land subsequently allotted under an inclosure, in respect of rights of common appurtenant to the lands described in the conveyances.

[THE question which was before the Court sufficiently appears by the following judgments.]

[650]

LORD KENYON, Ch. J.:

In the parish of Croydon there appears to have been a large quantity of waste ground, on which the tenants of the adjoining inclosures had rights of common. Before any inclosure was in contemplation those tenants purchased the right to all the tithes of the lay impropriator in respect of their several estates; and the conveyances were made in very general terms "of al and all manner of tithes, &c. belonging to or parcel of the rectory impropriate of Croydon, coming, arising &c. out of and upon, for or in respect of the several messuages or tenements,

farms, lands" &c. with some immaterial variations in the wording of the several deeds. And now it is contended that the lay impropriator intended to reserve the tithes in respect of the rights of common appurtenant to those estates. If the question had been put to him recently after the grants and before the inclosure was in contemplation, it cannot be conceived that he would have advanced such a claim, or that it could have been in the contemplation of any of the contracting parties at the time. It is evidently an after thought. It must be admitted that none of the conveyances do in terms apply to the tithe of the common land: but I cannot infer from thence that they were therefore intended to be excluded. The truth is that it was an object of too little importance to be worth attending to at that time. It is impossible however to distinguish this from the case of *Stockwell* v. *Terry*; † where an Act of Parliament having been passed for an inclosure of common, founded on an agreement of the parties that the tenants of the inclosure should enjoy all their rights in severalty as they did their rights of common before, a certain portion of the common was allotted to the defendant in lieu of his right of common, and the question was whether this was to be covered by a modus which was paid for it before when in common? And there though the common when inclosed yielded several species of tithes which it did not do before, yet Lord HARDWICKE held that it was covered by the same modus. And he said that though the recital in the Act of Parliament, to which all the parties interested had agreed used only general words, yet the intention plainly was that every person should enjoy his allotment in the same manner as he did the thing in lieu, and that having been subject to the *modus the allotment should be [*651] so still. Then the case of *Moncaster* v. *Watson*, ‡ so far from contravening that doctrine as is supposed, affects to follow and adopt it. The case indeed there was different, because the modus was confined to the demesne lands and did not extend or affect to extend to the common. Upon the whole I am satisfied that there was no intention in the parties to these several conveyances to exclude the tithes of the common: and I think that the general words of grant used are sufficient to carry them.

† 1 Ves. [sen.] 115.

‡ 3 Burr. 1375.

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ASHHURST, J. :

The words of grant used, are comprehensive enough to pass every species of tithe; and I see no ground for supposing that the parties intended to make a distinction between the tithes of the common, and those of the inclosures.

GROSE, J. :

The question is whether the rectorial tithes arising out of the rights of common were conveyed by the several deeds set forth in the case. The words of grant used are very large and ample; they are of the tithes arising, &c. out of or in respect of the several messuages or tenements, farms, lands, and hereditaments. Now without relying upon the last-mentioned word "hereditaments," I consider the right of common as part of the land to which it is appurtenant, and that all tithes were meant to be conveyed which arose out of, or in respect of the land, and therefore the tithe of the common amongst the rest. I also consider the right of common, as necessarily implied under the word "farm." Therefore there being no apparent intention not to pass these particular tithes, and the words being large enough to convey all the tithes, there is no ground for saying that the tithes of the common did not pass with the rest.

LAWRENCE, J. :

The evident meaning of the parties was, that whatever tithes the tenants of the estates were liable to pay, whether more or less, should be conveyed to them; and the small value of the tithes arising out of the common before the inclosure, cannot vary the question. The quantum of the allotments in lieu of the former rights is a question for the commissioners.

Postea to the plaintiffs.

S. HARTON AND B. HARTON, WIDOW, *v.* W. H. HARTON AND ANOTHER.

1798. *May* 15.

[652]

(7 T. R. 652—654.)

A devise of lands to trustees and their heirs, upon trust to permit a *feme covert* to receive and take the rents and profits during her life, for her sole and separate use, and after her decease then to the use of the first and other sons of her body, and in default of such issue then to the use of the daughters as tenants in common, and in default of such issue upon further trust to permit another *feme covert* to take the rents and profits during her life for her separate use, &c. vests the legal estate in the trustees in fee simple.

THE following case was sent by the LORD CHANCELLOR for the opinion of this Court.

Samuel Jaques deceased being seised in fee of several freehold and copyhold estates, and having surrended the copyhold to the use of his will, by his will dated 27th November, 1767, duly executed and attested to pass lands, devised to the defendant John Crozier and John Lightfoot since deceased and their heirs all his messuages lands tenements and hereditaments in the parish of Iver in the county of Bucks, and at Pinner in the county of Middlesex, with their appurtenances, upon trust to permit and suffer his niece the plaintiff Bridget Harton, then the wife of William Harton, to receive and take the rents and profits of all the said premises during her life for her own sole and separate use, notwithstanding her coverture, and without being in any wise subject and liable to the debts, management, power, or control of her then or any after-taken husband, and her receipt alone from time to time to be a sufficient discharge for the same; and after her decease then to the use of the first son of the body of his said niece Bridget Harton lawfully begotten and the heirs of his body lawfully issuing; and for want of such issue then to the use of the 2nd, 3rd, 4th, 5th, and every other son and sons of his said niece, Bridget Harton, lawfully begotten, and the heirs of their respective bodies lawfully issuing, successively as they should be in seniority of age, and priority of birth, the eldest of such sons, and the heirs of his body being always to be preferred, and taken before the younger of such sons, and the heirs of his body; and in default of such issue to the use of all and every the daughter and

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daughters of his said niece Bridget Harton lawfully begotten and the heirs of their respective bodies lawfully issuing, to take as tenants in common and not as joint tenants; and in default of such issue of his said niece Bridget Harton the said testator devised the said estates, without inserting any new limitation, upon further trust to permit and suffer his niece Anna Maria, then the wife of J. Hogard, to take the rents and profits of all the premises devised to the said Bridget Harton as aforesaid during her life for her separate use, in like manner and with such remainders over *to the use of the first and other sons of his said niece Anna [*653] Maria in tail, with remainder to her daughters in tail, as tenants in common, as the said premises are and stand limited above in trust for his said niece Bridget Harton for her life and to the use of the issue of her body in tail; and in default of such issue as aforesaid of his said niece Anna Maria, then upon further trust to permit and suffer his niece Sarah Jaques spinster, to receive and take the rents and profits of all and singular the said premises during her life for her sole and separate use, in like manner and with such remainders over to the use of the first and other sons of his said niece Sarah Jaques in tail, with remainder to her daughters in tail, as tenants in common, as the said premises are and stand limited above in his said will in trust for his said nieces Bridget Harton and Anna Maria Hogard respectively for life, with remainder to the use of the issue of their respective bodies in tail; and in default of such issue as aforesaid of his said niece Sarah Jaques, to the use of his cousin Samuel Plumb, Esq. and the heirs of his body lawfully begotten; and in default of such issue to his (the devisor's) own right heirs for ever. The devisor died seised, on the 18th June, 1771, without having revoked or altered his said will, and left the said plaintiff, Bridget Harton his heir at law and customary heir. The plaintiff Samuel Harton is the first son of the body of the said plaintiff Bridget Harton, and the defendant William Henry Harton is the second son of her body. The defendant John Crozier is the surviving trustee in the said will, John Lightfoot his co-trustee, therein named, being dead. The questions were, whether by the will of S. Jaques, of the 27th November, 1767, the first son of the body of Bridget Harton took a legal remainder in

tail in the estates thereby devised, or whether John Crozier and John Lightfoot, the trustees, took a fee-simple in the premises by the said will.

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Law for the plaintiffs, mentioned the case of *South* v. *Alleine*† as the only one like this case upon which he could build any argument in favour of the plaintiffs: but being pressed by the Court as to the authority of that case, he admitted that it could not hold, as without adjudging the legal estate to be in the trustees, the interests of the several *femes coverts* would not be secured, and so the intention of the devisor might be defeated.

LORD KENYON, Ch. J.:

Whether this be a use executed in the trustees or not, must depend upon the intention of the devisor, *which is to be collected [*654] from the will. This provision, it appears, was made in order to secure to the several *femes coverts* a separate allowance free from the control of their husbands, to effectuate which, it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object that the devisor had in view.

The other Judges concurred, and

LAWRENCE, J. mentioned the case of *Jones* v. *Lord Say and Seal*, 1 Eq. Abr. 383, where the devise was to trustees and their heirs in trust to pay several legacies and annuities, and to pay the surplus to a *feme covert* for life to her separate use or as she should direct, and after her death the trustees to stand seised to the use of the heirs of her body with remainder over, it was holden that by the words of the will, the use was executed in the trustees and their heirs during the life of the *feme covert*, and after her death it was executed in the persons entitled to take, charged with the annuities.

† Salk. 228. See the report of the same case under the name of *Bush* v. *Allen* in 5 Mod. 63.

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Lord KENYON, Ch. J. said that *Jones* v. *Lord Say and Seal* was a case by itself. The best report of it was in Viner's Abr. (8 vol. 262), and it was recognised to be law, by Lord HARDWICKE in *Bagshaw* v. *Spencer*.*

The following certificate was afterwards sent to the Lord Chancellor;

"We have heard this case argued by counsel, and are of opinion that the legal estate by way of use executed in fee simple, vested in John Crozier and John Lightfoot; that construction being necessary (as we conceived) to give legal effect to the testator's intention, to secure the beneficial interest to the separate use of the several *femes covert*.

"KENYON,
"W. H. ASHHURST,
"N. GROSE,
"J. LAWRENCE."

1798. *May* 15.

CROWTHER *v.* RAMSBOTTOM AND OTHERS.

(7 T. R. 654—658.)

[654]

In trespass for breaking and entering the plaintiff's close, and taking his goods, the defendant may justify under sufficient legal process, if he had it in fact at the time, although he had at the time of entering assigned another cause for the seizure.

THIS was an action for breaking and entering the plaintiff's cow-house, and taking away three cows, &c.

[The defendant justified his act under a writ of process issued in due form of law, to which the plaintiff replied that although the writ was duly issued, the defendant did not take the goods for the purposes of the writ (which was to compel appearance) but of their own wrong. On the trial evidence was admitted of (*inter alia*) a statement by the officer who executed the writ, that the cattle were taken for a 7*l*. debt and costs, and there was evidence of excess in the execution and of some violence in the manner of it. There was also evidence of refusal to accept a tender of the usual fee for appearance. On this evidence, which

* Vid. 1 Ves. 144.

the learned judge treated as material, in his charge to the jury, he left them to say whether the defendants entered for the mere purpose of compelling an appearance, or whether for the purpose of compelling the plaintiff to pay the debt and costs. The jury found a verdict for the plaintiff with 20*l*. damages.]

[656]

Topping moved for a new trial in Michaelmas Term last, on two grounds; 1st, because the verdict was against law and evidence; 2nd, Because the evidence received of the tender of money by the plaintiff after the taking of the cattle, was not relevant to the issue, which was whether the cattle were or were not taken under a lawful authority.

[A rule having been granted, the question was argued by *Law* and *Evans* for the plaintiff.]

[657]

Gibbs and *Topping*, *contrà*, were stopped by the Court.

LORD KENYON, Ch. J.:

I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal *justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service.† Now here it appears that the defendants were justified under the process of the county court, in entering upon the plaintiff and taking his goods in order to compel an appearance; and therefore the question ought not to have been left to the jury to say whether they entered for that or some other cause. Then as to the excess of the distress taken, an action on the case lies for that on the Statute of Marlbridge; but that will not warrant an action of trespass. This question was considered in the case of *Hutchins* v. *Chambers*;‡ and the rule was then settled. Though it was said that there was one excepted case, namely, where gold or silver was taken to an excess apparent on the face it; as where six ounces of gold and 100 ounces of silver were taken for 6*s*. 8*d*.: but that went on the ground that gold and silver were of a certain known value,

[*658]

† Vi. Fitz. Avowry, 232, 3 Co. 26.

‡ 1 Burr. 579.

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and the measure of the value of other things. Here the verdict having proceeded on a mistake of the law, there must be a new trial.

ASHHURST and GROSE, Justices, were of the same opinion.

LAWRENCE, J.:

The case of *Dr. Grenville* v. *The College of Physicians*,† which came on upon demurrer, is directly in point. In trespass against J. S. for an assault and wounding and false imprisonment, the defendant as to the force, and arms, and wounding, pleaded not guilty; and as to the residue of the trespass, he justified it under the authority of the censors of the College for mal-practice by the plaintiff, in his profession of a physician. The plaintiff replied that the defendant *de injuriâ*, &c. made the assault, *absque hoc* that he did it by the authority set forth in the plea. And upon demurrer, the replication was held ill: and HOLT, Ch. J. said, "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has, is his justification." Now that very question was left by the learned Judge to the jury in this case, which was there stated to be immaterial. For it was not material to inquire what the defendants said when they entered and seized, but only whether they had in fact a legal warrant to justify them.

Rule absolute.

1798. *May* 18.

THE KING *v.* DYDE AND ANOTHER.

(7 T. R. 661.)

[661]

A defendant in a case where the King is party, cannot carry down the *nisi prius* record to trial by proviso, because no laches can be imputed to the King.

THESE were two indictments for misdemeanors preferred by the *Attorney-General*, at the sessions of Oyer and Terminer for the county of Middlesex, on the 20th June, 1796; the first for sending goods to France against the 34 Geo. III. c. 9, s. 2,

† 12 Mod. 386.

and the other for embarking in a vessel to go to France, against the 33 Geo. III. c. 27, s. 3. In Michaelmas Term, 1796, the defendants pleaded, and notice of trial was given on the part of the Crown for the sittings after that term, which was afterwards countermanded. A rule was obtained on a former day in this Term, calling on the prosecutor to shew cause why the defendants should not be at liberty to proceed to trial by proviso, at the sittings at *nisi prius* after this Term in Michaelmas; against which

THE KING v. DYDE.

Law, *Garrow*, and *Wood*, now shewed cause; saying that it was an established rule that a defendant cannot in any case in which the King is party, unless by his assent, carry down the record to trial by proviso, because no laches can be imputed to the King; and they cited *R.* v. *Sir Jacob Banks*, 6 Mod. 247, and 2 Inst. 424.

Erskine, *contrà*, admitted that the rule could not be supported. And

Per CURIAM: *Rule discharged.*

K. B. TRINITY TERM.

GEYER *v.* AGUILAR.†

(7 T. R. 681—697.)

1798. *June* 15.

[681]

By the sentence of a French Court of Admiralty, it appeared that the ship insured warranted American, had been condemned as enemy's property, for want of having on board a *rôle d'équipage* or list of the crew, such as is required by marine ordinance of France and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America; held to be conclusive evidence against the warranty of neutrality, though in fact the ship was American.

THIS action was brought to recover a total loss by capture upon a policy of insurance underwritten by the defendant on the freight of the American ship *Rainbow*, William Smith master, at

† See note to the judgment of LAWRENCE, J. in *Calvert* v. *Bovill*, p. 520, *ante*.—R. C.

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and from Charlestown to London, "warranted American property," and value at 800*l*. The premium having been returned and accepted without prejudice, the defendant pleaded the general issue; and on the trial at the Guildhall sittings after Hilary Term, 1798, the following case in substance, was reserved for the opinion of this Court. The plaintiff resides at Charlestown in North America, and was the sole owner of the ship *Rainbow*, which took in a cargo at Charlestown upon freight for the voyage described in the policy. The ship sailed upon the voyage insured under the command of Captain W. Smith, a native of the island of Bermuda, who was naturalised in the United States of North America, on the 18th January, 1796; and on the 25th of March, 1797, she was captured by a French privateer and carried into Nantz in France, where she was condemned and sold for the benefit of the captors. The *Rainbow* at the time of her first sailing and till her capture, had on board a proper register as an American-built vessel, a passport or seabrief duly certified, and the several other documents referred to in the sentences of condemnation; but she had no certified *rôle d'équipage* or list of her crew. The plaintiff offered to prove that he was born within the United States of North America, and had been domiciled there from his birth, and that the ship and freight were his sole property: but on the other hand there was produced a record of condemnation by the Commercial Tribunal of Nantz, having competent jurisdiction dated 12th May, 1797, which stated the questions of fact made to be, 1st, Whether the ship *Rainbow* and her cargo were neutral property? 2nd, Whether the papers and other things found on board the *Rainbow* sufficiently proved the property? and the questions of right to be, 1st, Whether a neutral American ship fitted out with papers vouching its neutrality were a lawful prize, for having on board bills of lading of her cargo which are not signed? 2ndly, Whether these bills of lading not positively pointing out that the merchandise which they contained, were neutral property could give cause for confiscation? 3rdly, Whether a neutral American

[*682] ship was to be declared a lawful prize *because she had not on board a list of the crew, or because that which she produced was not signed by a public officer? &c. It then stated that the

privateer having chased the *Rainbow* which carried American colours brought her to, and on examination of her papers the French captain observed there was no list of the crew, that the manifest of the cargo was contrary to the declaration made to him by the American officer, and that the bills of lading produced were not signed; for which reason he thought the American ship a lawful prize, especially as her destination was for London, an enemy's country. He therefore brought her into Nantz. That Captain Smith offered to prove, 1st, That the ship *Rainbow* was American built and American property, consequently neutral; 2ndly, That the goods on board her belonged to and were going on account and risk of subjects of the United States of America, and consequently were neutral property also. To prove the first point it was argued that the 25th article of the treaty between France and America made 6th February, 1778, required that when either of the powers should be engaged in war, the ships of the other should be provided with a sea-letter or passport, expressing the property and destination of the ship, with the name and abode of her master, and that Captain Smith had conformed to this law. First he carried a register dated 6th October, 1795, delivered at Charlestown by the proper officers which proves the ship *Rainbow*, American built and owned by John Geyer an American citizen; on which register there was an indorsement that Captain Smith after taking the usual oath had taken the command of the ship. Then he produced a passport or sea-letter in due form from the American government dated 14th of February, 1797, for the voyage insured. 2ndly, To prove the cargo American and neutral, five bills of lading were produced expressing the real names of the parties, &c. And annexed to the ship's manifest to a judicial act, proving authentically that the shippers of the goods therein specified which correspond with the bills of lading had appeared before a justice and notary of Charlestown and sworn before him that the goods they had laden in this ship were their property and that no subjects of the powers then at war had either directly or indirectly any interest therein; which paper was duly legalised by Citizen Dupont the French consul, and dated at Charlestown 2nd *Ventose*, in the 5th year of the Republic. On the part of

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the captors it was replied that the 25th article of the treaty *of February, 1778, required American ships to have on board a list signed containing the names, surnames, places of birth and abode of the persons composing their crews or embarking on board them, and that in every port the captain should shew it to the custom-house officers and justices; that Captain Smith had not on board such a list; consequently it was in contravention of the law, and as such subject to confiscation. That this law is confirmed by the 9th article of the regulation of 26th July, 1778, which declares all foreign ships to be good prize that have not on board a list of the crew signed by the public officers of the neutral place they depart from; and still further confirmed by the fourth article of the decree of the Executive Directory of 12th *Ventose* last, which says that conformable to the law of 14th February, 1793, the regulations of 21st October, 1744, and 26th July, 1778, concerning the manner of proving the property of neutral ships and goods, shall be executed according to their meaning and tenor; consequently all American ships that have [not] on board a list of the crew, in due form as prescribed by the model annexed to the treaty of the 6th of February, 1778, shall be good prize, and the execution of which is ordered by the 25th and 27th articles of the same treaty. That also by the 9th article of the regulation of 1778, in order for any vessel to be considered neutral, she should not have on board a commanding officer of an enemy's country, and Capt. Smith is an Englishman born; and that the letter of naturalisation in the American States delivered to him at Charlestown on the 18th of January, 1796, was insufficient because annulled by the regulations of the 23rd of July, 1794, and the 21st of October, 1744, expressly requiring that the letter of naturalisation should have been obtained before the declaration of war, and that those to whom they are granted should have been domiciled in the neutral states before that period and should not have returned to their native countries since their letters were obtained. But Capt. Smith did not obtain his letters of naturalisation till after the declaration of war between the French Republic and England, no mention is made what time he had lived in the United States, and it appeared he had

returned to England since he obtained his naturalisation. In reply it was observed, 1st, that it was not customary in the United States for masters of ships to have lists of their crews, and that there was no public officer appointed to deliver them. That the only paper of the kind made use of was one produced of an agreement between the master and the crew; *and that it [*684] must have been by mistake that the decree of the Executive Directory of 12th *Ventose* last seemed to require of American ships a list of their crew in any different form, since the 25th and 27th articles of that treaty, the execution of which is prescribed, do not speak of it. Moreover this decree being of a date posterior to the departure of the *Rainbow* from Charlestown could not have any retrospective effect, and consequently could not be obligatory upon Captain Smith. That as to the act of naturalisation, it was in the form customary in America, that Captain Smith having fulfilled all the formalities prescribed by the laws of the country and taken the requisite oath was declared and enrolled a citizen of the United States. Then the tribunal passed sentence in the following terms; "Considering that the 7th article of the law of 13th *Nivose* in the 3rd year, which abrogated that of the 9th of May, 1793, cannot be applied to Captain Smith according to the decree of the Executory Directory of 12th *Ventose*, and that this law remains in force; considering that such decree of 12th *Ventose* declares lawful prize, all American ships not having a list of their crews conformable to what is prescribed by the model annexed to the treaty of February, 1778; that the same decree orders agreeably to the law of the 9th of May, 1793, the execution of the regulation for neutrals in time of war of the 21st of October, 1744, and the 22nd of July, 1778, fixing the manner of establishing at sea the property of neutral ships and goods; considering that there was not on board the ship *Rainbow* such a list of the crew as is prescribed by the model annexed to the said treaty; that the captain of the *Rainbow* has only produced conformable to the 27th article of such treaty, his passport or sea-letter, and the Act of the American congress of the 26th July, 1790, on the back of which is an agreement printed in English and subscribed by only seven of his crew, and that it was not till after the

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examinations, that there were twelve names upon it, being the crew on board; considering that the captain produced only bills of lading without signature, which as such are null; that the only authentic paper he produced is a manifest of his cargo with a declaration of the shippers that it is their sole property, which declaration has been received by a justice and notary of Charlestown and the signature of which has been legalised by the consul of the French Republic resident there; considering that the decree of the Directory of 12th *Ventose* last peremptorily declares American ships which shall not have on board lists of

[*685] their crews lawful prizes, and declares them at *the same time enemies; considering, lastly, that a ship declared an enemy and to be a good prize, includes the confiscation of her cargo; the tribunal, in conformity to the decree of the Executive Directory before quoted, adjudges and declares the validity of the prize of the American ship *Rainbow*, Captain William Smith; adjudges likewise the validity of the capture and confiscation of all the cargo, &c.; the whole being, for want of Captain Smith's having the papers in due form, thought to belong to enemies of the Republic," &c.

The case then set forth another sentence upon appeal [which, in effect, confirmed the above sentence; and also set forth at length the ordinances above referred to, so far as they were thought material.

[690] The case further stated that it was admitted that the plaintiff, if it be open to him to establish the truth of his warranty, but subject to the legal effect of the above sentences and papers in a British court, is really a subject of the United States of America, having been born and domiciled there from his birth; and that he is the sole proprietor of the ship *Rainbow*, and of the freight insured. The question for the opinion of the Court was whether the plaintiff was entitled to recover, or precluded from so doing; if entitled to recover, a verdict to be entered up for 183*l.* 4*s.*; if precluded from recovering, a nonsuit to be recorded.

This case was first argued in Easter Term last by *Marryat* for the plaintiff, and *Carr* for the defendant; and now by *Law* for the plaintiff, and *Gibbs* for the defendant. * * *

LORD KENYON, Ch. J.:

When this case was argued in the last term, the parties desired to have a second argument; to this the Court readily acceded from an anxious wish that it might produce such arguments and reasons as would enable them to form a judicial opinion according to their individual feeling. The situation of Judges is such that they are sometimes obliged to decide against their own feelings as men. We come to decide this case bound and shackled by certain rules from which we dare not depart. [695]
The acts of pirates are to be treated as the acts of pirates: they do not profess to have any civil code of laws by which they are to be restrained. But civilised nations profess to be governed by certain rules, and the comity due from the courts in one country to those in another induces them to give credit to each other's acts; *and so we must continue to act in this country until the [*696]
Legislature shall think fit to forbid it. There is the same comity between the different courts in this kingdom. Where there has been a proceeding in the Exchequer and a judgment *in rem*, as long as the judgment remains in force it is obligatory on the parties who have civil rights depending on the same question. Not long after Lord Mansfield came into this court, in an action brought against an officer of the customs or excise, he was told by Mr. J. DENISON that as [the] question had been already decided in the Exchequer by a condemnation of the goods seized, the judgment of that Court was conclusive in favour of the defendant here; at first Lord MANSFIELD doubted the propriety of that opinion, but on enquiry finding that Mr. J. DENISON was right he acquiesced, and always afterwards acted upon it. I admit the cases of *Mayne* v. *Walter* † and *Saloucci* v. *Johnson* ‡ up to their extent; I admit that, if a foreign Court of Admiralty proceed on grounds contrary to the law of nations, their judgment ought not to have weight in the courts of this country. But let us see what this case is: the ground on which the courts in France proceeded was that this was a capture of enemy's property; and it certainly is not contrary to the law of nations to condemn a ship on that ground. Whether or not those courts

† B. R. E. 22 Geo. III.; Park's Insurance, 414.

‡ B. R. Tr. 25 Geo. III.; *ib.* 415.

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arrived at that conclusion by proper means, I am not at liberty to enquire; here the question is whether they have not stated as the ground of condemnation, a ground which will bear them out, supposing it to be true? and I am clearly satisfied that they have. They concluded from the evidence that this was enemy's property, not indeed in the formal language of our courts of justice, but they say in substance "We think this is enemy's property, and therefore we condemn the ship and cargo." Now that concludes this case; for as long as the foreign judgment is binding upon us, the conclusion that we must draw from the judgments in this case in France, is that the property which was warranted to be American is found by that judgment not to be American property. I feel this however as the grossest injustice towards the Americans. The French courts seem in this instance to have proceeded on Algerine (nay on worse) principles; because they professed to proceed according to law, but in reality made the law a stalking-horse for an act of piracy. But I cannot now question the legality of their decision; I am bound to decide according to the law; it is my duty *jus dicere et non jus dare*.

[697] ASHHURST, J.:

Though most probably we should not have given the same judgment as the French courts gave, if the question of neutrality had first arisen here, it is not open to us now to canvass that question. Those courts had competent jurisdiction over the subject matter; and it is an established rule that the judgment of a foreign court, whether it be the court of a country at enmity, or in amity with us, is conclusive if the same question arise again here. Now as the French courts have already given a judicial opinion upon this question, it must govern us whatever may be our opinions concerning the real merits of the case.

GROSE, J.:

I agree in the opinion already given. But I cannot express in better terms than my Lord KENYON, that I feel myself bound to give judgment in favour of the defendant, and at the same time lament the necessity of so deciding.

LAWRENCE, J.:

. If we could have examined the grounds on which the French courts determined this to be enemy's property, probably we should have formed a different conclusion: but we cannot review those judgments here. They have decided the question, though by no means according to my opinion: but having so decided, the rule undoubtedly is, that whenever a court of competent jurisdiction has decided any question, and the same question arises incidentally in another court, the latter is concluded by the former judgment. The case of *Hughes* v. *Cornelias* * shews that this rule is not confined to judgments given in our own courts; there in an action of trover for a ship and goods, a special verdict was found setting forth a sentence in the Admiralty Court in France, which was in favour of the defendant, and "Per CURIAM, Agreed and adjudged that as we are to take notice of a sentence in the Admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations, that we should take notice and approve of the laws of their countries in such particulars." According to all the authorities therefore, I think we are concluded in this case by the judgments given in France, however we may feel the impropriety of those decisions.

Judgment for the defendant.

* 2 Show. 232.

1798.
June 18.

[705]

RICH *v.* PARKER.

(7 T. R. 705—711.)

A warranty in a policy of insurance, that the ship is American property means that the ship is entitled to all the privileges of an American flag: and if she has no passport on board (which is required by the treaty between France and America) the warranty is not complied with, and the assured cannot recover against the underwriter, though in fact the ship suffers no inconveniences in the voyage from the want of the passport.

THIS was an action on two policies of insurance, one on the ship, the *Atlantic*, the other on goods on board her, from London to Guernsey, from thence to the coast of Africa during her stay and trade there, and at and from thence to her port or ports of
[*706] discharge in all or any of the British West-India Islands *and America. The ship and goods were warranted to be American property. The plaintiff averred that the ship and goods were American, and then stated that the ship sailed from London to Guernsey and from thence to the coast of Africa, where she was captured by an enemy.

The defendant pleaded the general issue, and on the trial before Lord Kenyon, at Guildhall, a special verdict was found; which (after stating the making of the policies, the sailing and capture of the ship as set forth in the declaration,) stated that the ship, the *Atlantic*, was an American ship and the property of the plaintiff, a native and citizen of the United States of America, and that the goods were American property. It then set forth the treaty between France and the United States of America, in 1778; in which it was agreed (*inter alia*) that the ships and vessels belonging to the subjects of the other ally must be furnished with sea-letters, or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the ship, that it might thereby appear that the ship really and truly belonged to the subjects of one of the parties; which passport should be made out and granted according to the form annexed. And it was further agreed that if the ships of the subjects of either of the parties should be met with, either sailing along the coast or

on the high seas, by any ships of war of the other, or by any privateers, the ships of war or privateers, for the avoiding of any disorder, should remain out of cannon-shot and might send their boats on board the merchant ship which they should so meet with, and might enter her to the number of two or three men only, to whom the master or commander of such ship or vessel should exhibit his passport concerning the property of the ship, made out according to the form inserted in that treaty. And that the ship, when she should have shown such passport, should be free and at liberty to pursue her voyage, so as it should not be lawful to molest or search in any manner, or to give her chase, or to force her to quit her intended course. The verdict then stated, that before and at the time of sailing of the ship, &c. this country was engaged in a war with France; and that the ship when she so sailed from London on her voyage for Guernsey, had not on board any sea-letter or passport made out and granted for her according to the form annexed to the treaty; but that at the time of her sailing from Guernsey and from thence continually, afterwards, until, and at the time of the *capture she was furnished with and had on board her such a [*707] sea-letter or passport, &c. and which was exhibited and shewn at the time of her capture and loss, by the master of the ship, to the commander of the French privateer. But whether, &c.

Park, for the plaintiff, after stating the question to be, whether or not the warranty in the policy, that the ship and cargo were American property, had been complied with, argued in the affirmative. Whether or not a warranty has been complied with, is a question of fact to be established by evidence: now here that fact is expressly found by the jury, and that precludes all farther argument. The defendant however insists that the ship was not American, because she had not the passport on board during the former part of the voyage. But, in the first place, the passport was on board before, and at the time of the capture; and it does not appear that the ship suffered the least inconvenience or interruption from not having it on board when she sailed from London to Guernsey. And in the next place the want of that passport neither negatives the warranty that the

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ship and goods were American, nor was it a cause of seizure or confiscation either by the law of nations or by the treaty between France and America. Whether the ship were or were not American is one question, whether or not she had the passport on board is another, not depending on the former. There is no pretence to say that the want of this passport was a cause of seizure or confiscation by the law of nations. It has never been holden that the want of such a paper disproved the warranty of neutrality. The want of certain documents may indeed afford a ground of suspicion that the ship is not neutral, and when connected with other circumstances may be a ground of confiscation: but there is no instance of a sentence of condemnation merely on the ground that the ship had not particular papers on board. Even if there had been a sentence in a foreign court condemning this ship on this ground, and that reason had been stated as the foundation of the sentence, it would not have been conclusive here. *Calvert* v. *Bovill*, 7 T. R. 523.† The circumstance of material papers being thrown overboard just before the ship is taken, raises a stronger suspicion than the want of such a document as a passport, but that alone is not a sufficient ground of condemnation. *Bernardi* v. *Motteux*, Dougl. 574. And in *Saloucci* v. *Johnson* ‡ it was not even argued that the want of a

[*708] charter-party was a ground of *condemnation. Then considering the treaty between France and America, the requiring of the passport is merely a regulation of convenience between the two states, having for its object that which is stated in the treaty, "so as it should not be lawful to molest or search in any manner or to give her chase, or to force her to quit her intended voyage." By the law of nations, any ship may be stopped on the high seas in time of war by either of the belligerent powers, in order to examine whether she is carrying any succours to an enemy, to avoid which, one of the articles in this treaty was inserted. The

tion of this treaty may be a cause of complaint as between vo nations, but as between the subjects of one of those .s and the subjects of any other nation, it is not a cause of ɔation, nor does it disprove the warranty of neutrality. If l the ship had been stopped on the high seas, and, for

† *Ante*, p. 517. ‡ Park's Insur. 415.

want of this paper, had been carried into a French port, perhaps that might have avoided the policy on the ground of a deviation, inasmuch as that would have arisen from the master's neglect: but that was not the case here, the passport being on board when the ship was taken.

Giles, for the defendant:

It is not sufficient for the insured to say that the ship and cargo were American; in order to charge the underwriter it must appear that the ship had all the privileges of an American flag. Now it is stated in this verdict that the ship in question, when she first sailed, had not the passport which is required by the treaty with France, and that subjected her to greater risks and interruptions than she would have been subject to if she had had this passport, and therefore the underwriter is discharged. This comes within the principle on which the cases of *Law* v. *Hollingworth* † and *Farmer* v. *Legg* ‡ were decided, where it was holden that the assured could not recover; in the latter, because the captain of an African slave ship had not the certificate of his service required by the stat. 31 Geo. III. c. 54, s. 7, in the former, because there was no pilot on board; and in which case Lord KENYON said "The principle on which this case must be determined, seems to be admitted on all hands, namely, that the assured cannot recover on a policy of assurance, unless they equip the ship with everything necessary to her navigation during the voyage; the ship herself must be sea-worthy, she must have a sufficient crew, and a captain and pilot of competent skill." It is not necessary for *the defendant to contend that the want of a passport in this case would have been a good ground of confiscation; it is enough if it subjected the ship to certain interruptions and detentions in her voyage, to which according to the terms of the contract she should not have been subject. The defendant had a right to expect that the ship should sail having everything on board to prevent her being rightfully stopped, and carried into an enemy's port. The circumstance of the ship's having this paper on board after she sailed from Guernsey is perfectly immaterial; because the warranty extended during the

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† 7 T. R. 160. ‡ 7 T. R. 186.

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whole voyage, and her not having this passport when she sailed, was a non-compliance with the warranty. The case of *Barzillay* v. *Lewis* † is a strong authority in favour of the defendant; for there though the ship which was warranted Dutch property was Dutch property, yet as she had not on board such a passport as was required by the regulations of France, it was holden that the assured could not recover.

LORD KENYON, Ch. J.:

Notwithstanding a wish has been expressed ‡ that there may be a second argument in this case, I cannot forbear saying what occurs to me at present on this subject. On the trial I gave my opinion strongly in favour of the defendant, and I have no reluctance in saying I continue of the same opinion. This was an insurance from London to Guernsey, from thence to the coast of Africa, and during her trade there, and from thence to the West Indies. Now nothing can be clearer than this, that if a ship that is insured be not sea-worthy or in a proper condition for sailing during any part of the voyage, nothing that happens afterwards can better her original situation. By the treaty between France and America, referred to in the case, it is agreed that the ships and vessels belonging to the subjects of either ally, must be furnished with sea-letters or passports, &c. Now I think, that the warranty in this policy, that the ship was American property, is not satisfied by merely shewing that in fact the ship was American property. When these parties entered into the contract of insurance, the underwriter was to be indemnified to a certain extent under this warranty; the ship was not only not to be liable to risks arising from her not being American property, but she was not to be liable to any inconveniencies or impediment in her voyage from her not being in the condition required by the

[*710] treaty with France. *The question here is whether or not this ship was in such a situation as to be entitled, in the words of the defendant's counsel, to all the privileges of an American flag; I think she was not. It is true perhaps that the French had no right to confiscate the ship for not having the passport on board,

† Park's Insur. 410.

‡ During the argument, the parties expressed a wish to have the case argued again.

if in fact it were proved that she was an American ship: but under the terms of this treaty, the French had a right to do certain acts which they could not have done according to the treaty if the passport had been on board. If the passport were on board, the French ships were not to come within cannon-shot, nor to chase or drive her out of her voyage, and they were not to send more than two or three men on board; which negative implies an affirmative, that in case she had no passport on board, the French would not have been guilty of any infraction of the treaty, if they had forced the ship out of her voyage. The parties to this contract of assurance meant that the underwriter should not be liable to such risks: but the ship was subject to these risks and inconveniences through the neglect of the assured, because he did not do all that was required by the treaty. Might not this ship have been carried into a French port and the voyage been thereby delayed for want of this passport, though perhaps ultimately she would not have been liable to confiscation? And is not that a greater risk than the underwriter engaged to insure in the case of a ship warranted American? It is true that the loss did not happen in consequence of the ship not having a passport, but still the underwriter was thereby put to greater risk than he would have been, if the ship had had this document on board. I am therefore of opinion as at present advised, that the plaintiff has no right to call on the underwriter.

ASHHURST, J.:

The warranty that the ship was American does not mean merely that the ship was American built, but that she was entitled to all the privileges and indemnities of an American ship otherwise it makes a difference in the value of the risk; and in order to be entitled to these privileges she should have had a passport. The assured ought to disclose to the underwriter all the circumstances within his knowledge that may affect the quantum of the risk; now if the underwriter had been informed that this ship would not have any passport on board in the first part of the voyage from London to Guernsey, perhaps the underwriter would not have insured for the same premium. For this reason I think that the plaintiff is not entitled to recover in this action.

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GROSE, J.:

Although this appears to be the first case of the kind, I think that the principle established in the cases of *De Hahn* v. *Hartley* * and *Barzillay* v. *Lewis* must decide it. It was there holden that if a warranty be not strictly complied with the underwriter is discharged; and in the latter my brother BULLER said "The strongest ground seems to be that she was warranted to be Dutch property, and yet had none of the documents necessary to protect a neutral ship consistent with the regulations of the Court of France."

LAWRENCE, J.:

It was taken for granted by the plaintiff's counsel that it must be considered by the finding of the jury that the warranty was complied with; but they have only found the fact that the ship was American property; it remains for the Court to explain the meaning of the warranty. Now if the meaning of the warranty be that the ship is entitled to all the privileges of an American flag then this warranty was not complied with; and that seems to me the fair construction of the policy. Therefore I think the plaintiff is not entitled to recover.

Judgment for the plaintiff nisi.†

1798. *June* 19.

[711]

WILKINS AND ANOTHER, ASSIGNEES OF CANN, A BANKRUPT, *v.* CASEY.

(7 T. R. 711—713.)

A factor gave his acceptance to his principal for the amount of goods sold on account after a secret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy, the factor paid his acceptance to the holder of the bill; held that the payment was protected by the 1 Jac. I. c. 15, s. 14.‡

THIS was an action for money had and received by the defendant for the use of the plaintiffs as assignees of Thomas Cann a

* 1 T. R. 343; 1 R. R. 221.

† On a subsequent day in the Term, the plaintiff's counsel, finding the opinion of the Court so strongly against him, declined having a second argument.

‡ See now sect. 49 of the Bankruptcy Act, 1883.—R. C.

bankrupt, as also for the use of Cann before he became a bankrupt and also upon an account stated with the plaintiffs as such assignees, and also with Cann before he became a bankrupt. The defendant pleaded the general issue. On the trial of the cause at the last assizes for Gloucester before Heath, J. a verdict was taken for the defendant, subject to the opinion of this Court on a case reserved. Cann was a clothier, and the defendant his factor in London, and their course of trade was this; Cann consigned goods to the defendant which were sold by him, and he received 5 per cent. commission, taking on himself the risk of the debts. Goods to the amount of 222*l.* 18*s.* had previous to the act of bankruptcy *been so consigned to [*712] the defendant, and sold by him; and he was indebted to Cann to that amount. On the 21st of February, 1794, Cann committed an act of bankruptcy, on which the commission issued, by leaving his dwelling-house at Rodborough in the county of Gloucester to which he never returned. On the 22nd of February he arrived in London, and on the same day called on the defendant at his house in the Old Change, and after informing him that he wanted to pay for a quantity of wool which he had bargained for in the country, requested the defendant to furnish him with bills for the amount of the goods so sold by him as factor, and for which the defendant then stood indebted. The defendant thereupon accepted bills of exchange which Cann then drew payable to his own order at two, three, four, five, and six months after date, and indorsed in blank by him to the amount of 208*l.* 12*s.*, and also delivered to him one other bill dated 22nd February, 1794, drawn by the defendant and payable to one Terry for 14*l.* 6*s.* making together the sum of 222*l.* 18*s.* the whole balance due to Cann from the defendant, but for which no receipt or acknowledgment was given. These bills were discharged by the defendant as they became due.

Dauncey for the plaintiffs:

The payment by the defendant of Cann's bills after knowledge of his bankruptcy was not protected by the 1 Jac. I. c. 15, s. 14, which provides "that no debtor of bankrupt shall be endangered

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for the payment of his debt truly and *bonâ fide;* to any such bankrupt before such time as he shall understand or know that he is become a bankrupt." Exclusive of the statute, such a payment however fairly made after an act of bankruptcy, would not have been protected. The Act therefore furnishes an exception in that particular case to the general rule of law; and the Court will not extend that exception by implication, beyond the strict meaning of the words, in prejudice to the other creditors of the bankrupt. It is confined in terms to payments made without notice of the bankruptcy, and therefore does not extend to an acceptance of a bill, which is no payment but only an engagement to pay at some future time; and here the payment itself was made after the commission issued. The bills were given payable at such times as the defendant would have been liable to pay for the goods: the effect therefore of this transaction was to enable Cann to appropriate to his own use, by anticipation, so much of his property as would otherwise have devolved in
[*713] the ordinary course of dealing to his creditors; while *Casey did not advance his own liability more than it was before. So far was this from a payment before notice of the bankruptcy that it was not even an obligation to pay at that time. If the defendant had received Cann's acceptance, payable after the bankruptcy, he could not have set it off against a debt due to the bankrupt's estate at the time; for the 5 Geo. II. c. 30, s. 28, only provides that debts due at any time before the act of bankruptcy may be set off. Nor was this a debt which could have been proved under Cann's commission (supposing it to have been a voluntary acceptance) for the like reason; because it was not a debt due at the time when the act of bankruptcy was committed. And however hard the case may be, that is no answer to the demand at law.

Nolan, contrà, was stopped by the Court.

LORD KENYON, Ch. J.:

This is as clear a case as can be stated. If we had an election given us for the first time to put either a rigid or a liberal construction on the statute of James, I should not hesitate to say

that we ought to put a liberal construction upon it; for the object of it was to protect certain payments made to a bankrupt, that common sense and justice required should be deemed valid payments, and in this instance to correct the rigour of the bankrupt laws. Now if the defendant had given other goods in exchange for these at the time, that would have been a payment to all intents and purposes, though not made in monies numbered. And it has always been holden that giving a bill of exchange is deemed a payment in satisfaction, provided the bill be paid when due.

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The other Judges concurred.

Postea for the defendant.

HAUSSOULLIER *v.* HARTSINCK AND OTHERS.

1798. *June* 22.

(7 T. R. 733—735.)

[733]

A note, by which A. promises to pay to the bearer 50*l*. "being the portion of a value as under deposited in security for the payment thereof," may be declared upon as a promissory note.*

THIS was an action of assumpsit, brought by the plaintiff as the payee of the two following notes, against the defendants as the makers.

"No. 300. ORIGINAL SECURITY BANK, LONDON, No. 300.

"35, CORNHILL.

"This 7th day of September, 1797.

"£25. On the 10th day of November next, and after that date on demand we promise to pay to —— or bearer £25 being a portion of value as under deposited in security for the payment hereof, according to the receipt in our hands.

"HARTSINCK & Co."

The value deposited consisted in titles to property marked $\frac{A}{Q}$.

* See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) s. 3 (3), s. 83; Chalmers, p. 12.—R. C.

HAUSSOULLIER v. HARTSINCK.

"No. 41. ORIGINAL SECURITY BANK, LONDON, No. 41.
"No. 35, CORNHILL.

"This 5th day of July, 1797.

"£50. On the 19th day of October next, and after that date [*734] *on demand we promise to pay to —— or order 50*l.* for value deposited and registered.

"HARTSINCK & Co."

The defendants pleaded the general issue, and on the trial at Guildhall, a special case was reserved for the opinion of this Court.

The defendants are bankers in London, the style of their house being "The Original Security Bank." Previous to the issuing of the notes in question, J. Richardson had applied to the defendants to accommodate him with the loan of their notes to the amount of 3,200*l.* on the security of two renters shares in the Drury Lane Theatre; in consequence of which a deed was entered into, dated 20th July, 1797, by which Richardson covenanted to supply the defendants with sufficient money to discharge all such notes as should be issued by the defendants on his account, and if he should not that he would pay the defendants on this account, and if he should not that he would pay the defendants all such money as they should advance on them with interest at 5 per cent. per annum, it being agreed that they should never be in advance in cash for him on account of such notes: and by which deed Richardson assigned to two trustees certain deeds and conveyances by which he was entitled to and possessed of certain clear rents for every night on which any theatrical performance should be exhibited at Drury Lane, and of certain privileges and advantages in and out of the said theatre for the residue of certain terms of years, in trust as a collateral security for the defendants. In consequence of this agreement and deed, the defendants issued notes to Richardson to a large amount, and (*inter alia*) the two notes in question, which have the stamps on them required for promissory notes. The plaintiff discounted the notes in question, and is a *bonâ fide* holder of them for a valuable consideration. The question for

the opinion of the Court is, whether the plaintiff is entitled to recover on both or either of the notes.

Ward was to have argued this case for the plaintiff, and

Park for the defendant,

But the Court hinting a strong opinion in favour of the plaintiff,

Park shortly stated the ground on which this case had been considered in the Court of Chancery, from whence it came. That the notes were not payable at all events, but payable out of a particular fund alluded to in the notes, in case that fund should be sufficient. That the sum secured by one of them was described as "a portion of a value as," &c. in terms pointing out the fund out of which it was to be paid. That the payee was *of course to resort to that fund and not to the makers at all events. But, that even if the makers of the notes were absolutely liable, then the notes should have had a proper stamp for an agreement and not merely a stamp for a promissory note, the notes being agreements for a loan. But [*735]

The COURT said they were clearly of opinion, that, though as between the original parties to the transaction, the payment of the notes was to be carried to a particular amount, the defendants were liable on these notes which were payable at all events. And that the notes were on proper stamps.

Postea to the plaintiff.

THE KING *v.* E. M. DESPARD.†

(7 T. R. 736—744.)

1798. *June* 25.

[736]

A commitment for treasonable practices by a warrant of a Secretary of State under an Act which suspended the Habeas Corpus Act, is legal.

THE defendant was brought up in the custody of the governor of the house of correction, by virtue of a writ of habeas corpus

† This case is referred to in the judgments in *Ex parte Terraz* (1878) 4 Ex. D. 63, 69, 48 L. J. Ex. 214; and in *Reg.* v. *Jacobi* (1882) 46 L. T. 595, 596 *n.*, both cases under the Extradition Act, 1870.—R. C.

THE KING v. DESPARD.

issued out of this court, upon the motion of *Fergusson*, who now moved that the warrant of commitment returned and produced in court might be read; which being done it appeared that the defendant had been committed "for treasonable practices" by a warrant of the Duke of Portland, one of His Majesty's principal Secretaries of State.

An Act was passed in the present session of Parliament, 38 Geo. III. c. 36, for suspending the Habeas Corpus Act, whereby it is enacted "that every person or persons that are or shall be imprisoned within the kingdom of Great Britain, at, or upon the day on which the Act should receive the royal assent, or after by warrant of his Majesty's most honourable privy council, signed by six of the said privy council, for high treason, suspicion of treason, or treasonable practices, or by warrant signed by any of his Majesty's principal Secretaries of State for such causes as aforesaid, may be detained in custody, without bail or mainprize, until the 1st February, 1799, and that no judge or justice of the peace shall bail or try any such person or persons so committed without order from his Majesty's privy council, signed by six of the said privy council, till the said 1st February, 1799."

The *Attorney-General* first moved to quash the writ *quà improvide emanavit;* because he said this was a case within the above
[*737] *statute of the 38 Geo. III. by which the Court could neither bail nor discharge the defendant; and therefore the writ itself ought not to have been granted. But

The COURT refused to quash the writ; saying that it did not follow that because they might neither discharge nor bail the defendant after hearing the case argued, therefore the writ was improvidently issued.

Thereupon the return being first filed, *Fergusson* moved that the defendant should be discharged for the insufficiency of the warrant of commitment, it being for treasonable practices generally, without specifying the particular nature of them. The Habeas Corpus Act, 31 Car. II. c. 2, was passed not only in

affirmance of the common law, but also in order to carry more effectually into execution the provision of a former Act of the 16 Car. I. c. 10, s. 8, assuring to the party committed by the King or any of his privy council his writ of habeas corpus, and requiring the return to certify the true cause of such his detainer or imprisonment; and that the Court should proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not; and should therefore do what to justice should appertain, either by delivering, bailing, or remanding the prisoner. The Act of the 31 Car. II. points out the means by which the writ is to be executed: and with respect to state offences, it enacts that if a person be committed for high treason plainly and specially expressed in the warrant and be not indicted within a certain time, he shall be discharged; and as to less offences the Court are to examine the warrant to see whether it contain a legal charge of any offence; and if so, whether bailable; and if bailable, they are to discharge the party upon his giving sufficient surety according to the nature of the offence. Under these acts the Court are bound to examine into the legality of the warrant at common law, and adjudge accordingly. Then the 38 Geo. III. c. 36, which suspends the Habeas Corpus Act for a limited time in respect to persons committed for high treason, suspicion of treason, or treasonable practices, was not intended, nor does it purport to do away the necessity of a legal warrant of commitment at common law: but the only effect of it is to give a power amongst others to the Secretaries of State (so far authorising the power to commit long assumed by them in this country), to imprison for a longer space of time than ordinary without bringing the party imprisoned to trial. The Court will never put such a construction on the statute as by implication to infringe the liberties of the subject. And so far is the statute *from warranting by express words any new form of commitment that it has immediate reference to commitments at common law; for it refers to such persons as shall be in prison under any warrant of commitment at the day of passing this Act or afterwards, and it makes no distinction as to the form of the commitments before or after the passing of the Act, and does not [*738]

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profess to legalize such as were made before the Act if contrary to law.—Then the only question is whether a commitment for treasonable practices generally be good at common law. In the petition of rights 3 Car. I. c. 1, s. 5, after stating that of late many subjects had been imprisoned without any cause shewn, and when brought before justices by writ of habeas corpus, no cause was certified but that they were detained by the King's special command signified by the lords of the privy council, without being charged with anything to which they might make answer, the Parliament proceed to condemn such practice as contrary to law and the right of the subject. This (says Selden) was meant of charges which could not be put into the shape of an indictment. Lord Ch. J. VAUGHAN in *Bushell's* case* says that in the return to a habeas corpus, the cause of the imprisonment ought to appear as specifically and certainly to the judges of the return as it did to the Court or person authorized to commit; otherwise the Court cannot judge whether the cause of the commitment be according to law or not. For the same reason all the crown writers agree that the warrant must set forth the cause of commitment with convenient certainty, though it need not be with so much precision as in an indictment; 2 Inst. 52, 591; 2 Hawk. c. 16, s. 16; 2 Hale, 111. And formerly it was considered that a commitment for high treason generally was bad, without specifying the particular species of high treason; though that has been holden otherwise since in the case of *Sir W. Wyndham*,† because all species of high treason are capital and of the same degree; but still the Court will bail upon a commitment for felony generally.‡ Now here the charge of treasonable practices is of a very indefinite nature. It must mean something partaking of treason. It may be high treason, or petty treason, or misprision of either, or being accessory after the fact to either: it may be the publishing of a seditious libel, or even to the drinking to the health of a traitor or asserting the pope's supremacy; in short the kind of treasonable practices are so various that the Court cannot possibly know what the offence is of which this defendant is

* Vaugh. 137.

† 1 Stra. 2, and 3 Vin. Abr. 515.

‡ Vid. 2 Wils. 153.

accused. In the case of *W[illi]kes,† who was committed for a misdemeanor, the counsel for the crown admitted, and the Court held, that it must appear upon the face of the warrant for what particular species of crime or misdemeanor the party was committed. In *Chambre's* case‡ a commitment by the lords of the privy council "for insolent behaviour and words spoken at the council table" was holden insufficient; so a warrant "for divers causes and misdemeanors," *Freeman's* case.§ In *Lord Shaftesbury's* case‖ the Court had no doubt that a commitment by the House of Lords "for a high contempt against the House," generally, was bad; but they would not meddle with a matter out of their jurisdiction. So Dr. Alphonso¶ being committed by the college of physicians for ill-practising of physic, the return was holden insufficient, and the Court would have discharged him, but to prevent his being taken again upon a better warrant, he was bailed. Besides great inconveniences would ensue if a commitment for a cause so generally charged was deemed sufficient. In case of an escape permitted by a gaoler, it would be impossible to ascertain the degree of offence of which he had been guilty, as that follows the nature of the offence for which the party was committed. The Court cannot tell whether the commitment be for an offence bailable or not; or if bailable, what bail ought to be required. The party committed has no opportunity of knowing against what charge he is to prepare his defence. This inconvenience does not occur in cases of high treason, where by the Act of the 7 W. III. c. 3, s. 1, the prisoner is to have a copy of the indictment containing the overt acts charged, a certain number of days previous to his trial. This uncertainty also deprives the subject of one of the most essential privileges secured to him by the Habeas Corpus Act, namely, that he shall not be vexatiously committed again for the same offence after having been once discharged; for under cover of so general a charge the Court cannot know whether the commitment were for the same offence or not.

† 2 Wils. 156, 8.
‡ Cro. Car. 133.
§ Cro. Car. 579.
‖ 1 Mod. 144.

¶ 2 Bulstr. 259. The case states the commitment to have been for practising physic.

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Lastly, in case of an action for false imprisonment, the party committing, must justify it for the specific offence contained in the warrant; but this lets him into a variety of proof of different offences.

The *Attorney-General, contrà*, disclaimed any intention of arguing that the Act of 38 Geo. III. meant to legalize warrants in any other form than was warranted by the common law, but
[*740] said that this *form of commitment had been in constant use, at least from the time of King William to the present; and he referred to several precedents to the amount of above fifty in all† in the several reigns of King William, Queen Anne, George I. II. and III. of similar commitments, by secretaries of state and members of the privy council; some of these latter signed by the Lords NOTTINGHAM, SOMERS, and COWPER. And he referred in particular to a recent case of *Sayer* v. *Lord Rochford*,‡ where the warrant of commitment was in the same form, for treasonable practices; and yet it never occurred to the plaintiff's counsel§ to object to the legality of the warrant, although they did not want either inclination or talents to have raised the objection if they had thought there was any foundation for it. This practice is also confirmed by the several Acts of Parliament which have from time to time been passed for the suspension in part, or in whole, of the Habeas Corpus Act; for they all suspend its operation in cases of commitments for treasonable practices, although no such offence is specifically noticed in the Habeas

† The following were some of them:—Nathaniel Sharpe committed for treasonable and seditious practices 15th October, 1694, admitted to bail.—James Murray for treasonable practices 26th October, 1694, bailed.—John Gordon for the same 1st July, 8 W. III. bailed.—Charles Crosse for dangerous and treasonable practices 29th October, 8 W. III. bailed.—William Jackson for treasonable and seditious practices, 12th February, 2 Anne.—Cecilia Haines *alias* Russel and Richard Haines for treasonable practices, 23rd October, 5th Anne.—Richard Butler for dangerous and treasonable practices, 14th May, 2 Geo. I.—Johnson *alias* Kelly for treasonable practices, 4th June, 8 Geo. I.—David Boyce for the same, 27th May, 9 Geo. I.—John Purser for the same, 27th November, 20 Geo. II.

‡ 2 Blac. 1165.

§ These he stated to be the late Mr. Lee and Serjeant Glyn: but the report being only of what passed in Bank in C. B. does not of course mention Mr. Lee's name.

Corpus Act itself: they amount therefore to legislative recognitions of the practice of commitments in that form. Even with respect to the subject there is a degree of lenity in many cases in this mode of commitment: for it often happens that the facts disclosed would warrant a commitment for high treason; but if there be any doubt in the case, the commitment is only for treasonable practices, which, under the Habeas Corpus Act, at times, when it is in force, would entitle the party to be bailed. As to offences of the same nature committed in Scotland, the practice there is to commit on suspicion of treason; which practice is also recognised by the Acts of suspension referring to it in the same manner as they do to the practice of committing for treasonable practices in England. The arguments of inconvenience drawn from the uncertainty of the charge *are at least [*741] as strong against commitments on suspicion of treason, for mere suspicion may not even amount to treasonable practices, and yet they are admitted on all hands to be legal.

He also referred to instances of commitments for treasonable practices, where the practice was so far recognised in this Court as that the parties were thereupon bailed, and not discharged: one was the case of the *Bishop of Rochester*† 9 Geo. 1722, and the other was *Platt's* case, Easter T. 1777. The case in Bulstrode, which is scarcely intelligible, bears no analogy to the present; at any rate the commitment there did not stand on the same ground of precedent, and perhaps that case is not law. He also adverted to the doubt which had been insinuated, rather than insisted on, as to the power of the secretaries of state to commit for state offences; and observed that it had been recognised by Lord HOLT in 12 Mod. 82, who said it had never been questioned till lately.

Fergusson in reply, observed that the case *Sayre* v. *Lord Rochford* could not be considered as any authority in support of the practice, because the objection was never taken; and that as no case had been cited where such a warrant was expressly

† The report of this case in Fortes, 101, which is dated Old Bailey, 7th Sept. 8 Geo. I. states the bishop and some others who were committed with him, were committed for high treason, plainly expressed in the warrant of commitment.

THE KING c. DESPARD.

holden to be legal, it could not now be assumed that it was so. That the practice of the secretary of state's office was of no weight; for that might have been urged as strongly in support of general warrants which were now universally admitted to be illegal, though sanctioned by as much extrajudicial authority. And this practice was, if anything, rather more inconvenient, than that, because the certainty of the offence in the warrant is of more consequence than the naming of the offender; for the person arrested by virtue of a general warrant was, at least, sufficiently informed of the nature of the charge against him, and could prepare himself better either for his defence or for redress, than under a warrant of this description.

LORD KENYON, Ch. J.:

Though experiments of this kind have been frequently made in courts of justice, they seldom succeed. I remember when a doubt was made whether or not the House of Commons had the power of committing to prison. On that occasion a gentleman of great character and fortune, Sir J. Phillips, who had retired from the bar, appeared in this Court for the purpose of moving that the person who had been committed by the House might be
[*742] discharged: the Court heard him patiently, and *the public perhaps were gratified with hearing the question discussed; and though the motion was unsuccessful, I believe the public were satisfied that justice was properly administered. Many other cases of this kind have been agitated in this Court, where they have met the same fate. That every question concerning the liberty of the subject is important, I admit: but it does not follow that, because it is important, it is difficult to decide. The counsel, who moved to discharge this defendant, threw in a doubt whether or not a secretary of state has a right to commit, for his expression was "the power assumed by the secretaries of state:" but if we are to learn from the records in courts of justice and from the received practice at all times what is the law of the land, I have no difficulty in saying that the secretaries of state have the right to commit. This right was not even doubted by Lord CAMDEN, who expressed as great anxiety for the liberty of the subject of any man; indeed it has

been thought by some persons eminent in our profession, who have considered the point since, that he rather overstepped the line of the law in the case of *R.* v. *Wilkes*; and certainly if that judgment can be supported, many other cases that have been solemnly determined, cannot be reconciled with it.

In this case two questions have been made; one, whether the late Act of Parliament authorised any new form of commitment: but that question was at rest almost as soon as it was raised; the *Attorney-General* very properly admitted that that Act made no alteration in the form of commitments. The other question is, whether or not this commitment be good at common law. To one argument used by the defendant's counsel I cannot assent, namely, that no point is to be considered as law, unless it has been made and judicially decided: if that were true, farewell to the common law of the land. If I were asked in what case it was determined that a limitation to A. and his heirs gives a fee simple, I should be as unable to answer as Lord HALE was when the question was put to him. It is sufficient if the point has been acknowledged to be law at all times: the law of the land stands on precedents. I will not say whether or not the number of cases from the secretary of state's office constitutes the law upon this subject: but the course of office and variety of precedents acted upon, have been considered, by very able judges, as evidence of what is the law of the land; and I cannot get over the cases now referred to by the *Attorney-General*. The commitments *prior to the Revolution were complained of as [*743] grievances, and probably they gave rise to the Habeas Corpus Act: and if the instances of commitments mentioned on the part of the Crown had happened in the reign of Charles the Second or James the Second, I should not have relied much upon them. But the cases now cited happened since the Revolution; a time that Mr. J. Foster and other great men considered as an auspicious period for this country, and when the liberties of the subject were well understood and nobly asserted. Then let me see what was considered to be the law of the land at and after the Revolution, and particularly in the time of that great man, Lord HOLT. Out of the many cases that have now been mentioned, I have selected nine that cannot

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be distinguished from the present case, where the commitments were for "treasonable practices" generally, and where Lord HOLT and the rest of the Court were bound by their oaths to discharge the defendants if the commitments were illegal; and yet the Court did not discharge them. Finding these cases, I will not now inquire whether or not Lord HOLT decided rightly; I have no sources of intelligence from which I could make the inquiry: the records of the Court furnish me with the law of the land. Lord HOLT was a man above all praise; and he was assisted by able judges, one of whom was Mr. Justice J. POWELL, who fell little short of Lord HOLT himself. I will not overturn the law of the land as it has been handed down to me: it is not for the judges, who are to watch over the law, to overset it. Therefore on the authority of the precedents, nine of which are precisely in point, I am clearly of opinion that if we were to yield to this application we should forget the duty we owe to the public.

ASHHURST, J.:

The concurrence of men of such talents as Lords NOTTINGHAM, SOMERS, HOLT, and COWPER, when acting on warrants of this kind, is nearly equal in authority to an express decision on the very point. It is rather an extraordinary position of the defendant's counsel in this case, that nothing is to be considered as law but what has been solemnly decided; for a point may be so clear that it was never doubted, and yet if this position were well founded, it would not be law.

GROSE, J.:

The question is whether the prisoner has a right to be bailed or discharged, or whether we are not bound by the late Act of Parliament to remand him. The ground on which it is now contended that he ought to be bailed or discharged, is that the warrant does not specify what are the treasonable practices of
[*744] *which he is accused. Now it is admitted that a person may be committed for treason, or suspicion of treason without specifying the particular kinds of treason, and it now appears that there are precedents of warrants of commitment for treasonable practices, precisely in the form of this warrant, from the year

1694 to the present time. Then came the late Act of Parliament, which says that persons detained under warrants of commitment for treasonable practices, in the very words of this warrant, shall not be bailed; and yet we are desired to discharge this prisoner against the positive directions of the Act of Parliament. I am glad however that the habeas corpus was granted, because the parties have an opportunity of canvassing this point of law: and magistrates will know how to regulate their future practice by this decision.

LAWRENCE, J.:

The case chiefly relied on by the defendant's counsel is that in Bulstrode: but that case is not law; for in a subsequent case, *Dr. Grenville* v. *The College of Physicians** it was holden that the censors of the college were the sole judges, whether or not a person within their jurisdiction had been guilty of mal-practice in physic. With regard to the precedents cited of warrants like this, I think they are decisive of the present case. They are not to be compared to warrants signed by magistrates, who are not of the profession of the law, for some of them were signed by persons of the greatest eminence in the law, and therefore they are entitled to have great weight. Besides which it appears that several of the persons committed by those warrants have been at different times since the Revolution, brought up here, and that this Court thought they ought to be remanded unless they could give security. I [cannot] express myself better on this [c.v.] occasion than PARKER, Ch. J. did in *Sir William Wyndham's* case,† where he said "It has been urged that some particular species of treason must be expressed, and that it must have so much certainty as to appear to be high treason to the Court. I think this opinion is not to be maintained. We presume a magistrate does right, until the contrary appears; and it has never been holden necessary to express the covert act in the commitment." So in cases of this sort it is not neccessary to express in the warrant the particular species of treasonable practices.

Per CURIAM: *Let the prisoner be remanded.*

* 12 Mod. 326. † 1 Str. 3.

1798.
June 27.

[746]

THE KING *v.* ALLGOOD.

(7 T. R. 746.)

A freehold tenant of a manor has no right to inspect the court-rolls, unless there is some cause depending in which his right may be involved.

A RULE having been obtained calling on the defendant, the lord of the manor of Simonburn, in the county of Northumberland, to shew cause why a mandamus should not issue commanding him to permit J. Thompson, a freehold tenant of the manor, to inspect the court-rolls of the manor, and to take copies of them, founded on an affidavit of J. Thompson which merely stated that he was a freehold tenant of the manor, that he had occasion to inspect the court-rolls, and that he had applied for an inspection which had been refused;

Wood now shewed cause against it; insisting that a freehold tenant had no right to demand an inspection of the rolls of the manor, if there were no cause or proceeding instituted, in which his right might be involved.

Holroyd, in support of the rule, relied on the case of *R.* v. *Shelley*, 3 T. R. 141,* and the cases there referred to, so that in all cases a freehold tenant has a right to inspect the court-rolls, observing that the lord of the manor is merely the keeper of the rolls, and that the free suitors are the judges. But

The COURT were of opinion that unless there were some cause depending, the tenant had no right to call for an inspection of the court-rolls. And said, that it appeared in each of the cases cited in support of the rule, that there was some cause or proceeding instituted. Therefore they

Discharged the rule.

* 1 R. R. 673.

K. B. MICHAELMAS TERM.

CLAYTON *v.* BLAKEY.

(8 T. R. 3.)

1798. *Nov.* 9.

[3]

Though by the Statute of Frauds it is enacted that all leases by parol, for more than three years, shall have the effect of estates at will only, such a lease enures as a tenancy from year to year.

THIS was an action against a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit. The first count of the declaration stated a holding under a certain term, determinable on the 12th of May then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence, that the defendant had held the premises for two or three years, under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred; and the Statute of Frauds directing that any lease for more than three years, not reduced into writing, shall operate only as a tenancy at will, it was contended, at the trial of the last assizes for Northumberland, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that statement, that the plaintiff ought to be nonsuited. ROOKE, J. however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the statute.

LORD KENYON, Ch. J.:

The direction was right; for such a holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term: but what was then considered as a tenancy at will, has since been properly construed to enure as a tenancy from year to year.

Per CURIAM: *Rule refused.*

1798.
Nov. 13

[13]

CRAUFURD AND OTHERS *v.* HUNTER.*

(8 T. R. 13—25.)

Commissioners appointed by the Crown, under the authority of an Act of Parliament, which enabled them "to take into their possession and care all Dutch ships and effects detained or brought into the ports of Great Britain, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive from his Majesty and his Privy Council," may insure in their own names such ships and effects, after seizure abroad, and while they are in transitu to this country. A count, stating the nature of their trust, and averring the interest to be in themselves as commissioners, and another count to the like effect, but without any averment of interest at all, were both holden good upon the demurrer.

THIS was an action on a policy of insurance, brought by the plaintiffs, who were commissioners for the disposal of Dutch ships and effects, detained or brought into the ports of Great Britain, by virtue of an Act of the 35 Geo. III. c. 80, s. 21,† against one of the underwriters.

[The case was argued on demurrers to the declaration, and the points raised appear from the judgments, which were as follows :—]

[22] LORD KENYON, Ch. J. :

When this case was argued on the former occasion, the novelty of it, perhaps, raised some doubt, which required farther examination : but now that we have had an opportunity of

* See note at end of the report.—R. C.

† The 21st section of the 35 Geo. III. c. 80, reciting that several ships and vessels belonging to the subjects or inhabitants of the United Provinces, and also other ships and vessels, having on board goods, wares, merchandise, and effects, belonging to such subjects, had been, or might be thereafter detained in, or brought into the ports of this kingdom; and that such cargoes, and such ships and vessels, might perish and be greatly injured, if some provision were not made respecting the same, enacts, "That it shall and may be lawful for his Majesty, by and with the advice of his Privy Council, from time to time, to grant a commission or commissions, under the great seal of Great Britain, to three or more persons, authorising them to take such ships and cargoes into their possession, and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, according to such instructions as they shall from time to time receive from his Majesty, with the advice of his Privy Council."

considering the case more fully, I have arrived at the conclusion (perfectly satisfactory to my own mind) that the claim of the plaintiffs cannot be resisted. When this insurance was effected, the ships in question were at St. Helena, and were soon afterwards to come to this country to the plaintiffs, as trustees; the plaintiffs insured in the character of trustees; the underwriters knowing the statute, which had then recently passed, must have known what kind of interest the plaintiffs had in this property: and knowing all this, they took the premium from the plaintiffs, considering them as having a right to make the insurance; and, when the loss happened, they refused to pay what they had engaged to pay, pretending that the plaintiffs had no right to make the insurance. Unconscientious, however, as this objection so made by the defendant may be, if it be a legal objection, he has a right to insist upon it in a Court of Law. And the first question here is, Whether or not it has not been decided, in cases analogous to the present, that this is such an interest as may be insured? I think it has. The ships having been seized at sea by his Majesty's ships of war, for the purpose of being brought to this country, were at St. Helena, and were coming here to be under the care, management, and disposal of the commissioners appointed by the Act of Parliament which has been alluded to; having been so *seized, they could not come [*23] here under any other management, or to any other persons, than to the plaintiffs, as trustees. Then, can a trustee insure? There is no doubt but he may. It was said, however, in the course of the argument, that there cannot be a trustee for the Crown: but that argument was soon abandoned, as untenable; and certainly it cannot be supported. Then, can a consignee insure? Surely he may. Can an agent for prizes insure? Certainly; and these plaintiffs are like agents for prizes. I never shall speak lightly of any opinion given by Lord MANSFIELD: whether or not I should agree to every thing that was said in the *Omoa* case, I am not now prepared to say, not having heard it argued: when such a case comes before us, I shall determine it as well as I can, always giving great weight to the decisions of so able a Judge as Lord MANSFIELD. But with one part of that case I fully concur, and on that no doubt

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can be entertained; namely, that an agent for prizes, though he has not the possession, has such an interest in the ships coming home that he may insure; and, in so deciding, Lord MANSFIELD only proceeded on principles previously settled and established. Therefore, as well on the authority of that case, as on certain positions which must be admitted on all hands, I am of opinion, that the plaintiffs are entitled to our judgment on the first count.

The second question, Whether or not the plaintiffs may declare, in the manner in which the fourth count is framed, depends, I think, on the construction of the statute 19 Geo. II. c. 37. Notwithstanding what has been said in the argument on behalf of the defendant, I think that at common law a person might have insured without having any interest. And this is in some measure proved by the case cited from 2 Vernon; since that, an application was made to the Court of Chancery, to have the policy delivered up: for that Court sometimes relieves, as was said by Sir J. JEKYLL in *Cowper* v. *Cowper*,† against the rigour of the law, when certain circumstances are disclosed to induce that Court so to interfere. But the preamble and enacting part of the stat. 19 Geo. II. c. 37, remove all doubt on this point. It recites the mischiefs and inconveniences that had arisen from the making of assurances interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases, which, for very wise and politic reasons, were
[*24] excepted. Therefore I am satisfied that this *count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to "ships belonging to his Majesty, or any of his subjects," and does not extend to foreign ships. The defendant's counsel then wished us to consider these ships as belonging to the Government of this country: but that cannot be so considered; for the property in captured ships is not altered before condemnation in the Court of Admiralty.

ASHHURST, J.:

The principal question in this case arises on the fourth count of the declaration, namely, Whether or not it can be supported for want of an averment of interest in the plaintiffs in the subject

† Vide 2 P. Wms. 753.

matter insured? As to which, I am of opinion that the declaration is good without such an averment; for, in the first place, this does not seem to be a case that falls within the purview of the statute against gaming policies. But without entering into that, it does, in the present case, appear to be sufficiently clear that the plaintiffs were interested. It does not in any case appear to be necessary that there should be any technical form of words made use of by way of averment of interest; it is sufficient if the fact appear to be so. Here was a seizure of enemy's property, and then it vested in the Crown. Supposing the subject of the insurance had been an enemy's ship taken as prize in time of war by a King's ship, and the captain, as such, had insured her, I should conceive such insurance would be good, as the matter is of public notoriety: and the underwriters, from such a description, must have sufficient notice of the property. The information given to the underwriters by the plaintiffs, on the face of the present declaration, is matter of equal notoriety; for it shews the Act of Parliament by which a power and authority was vested in the Crown, for the several purposes therein mentioned; and that the plaintiffs were appointed commissioners by the King, to take care of such property, of a certain description, as might come into their hands, and that this was property of that description. This seems to be all that the underwriters could have occasion to know, and that the plaintiffs were in the nature of agents. The plaintiffs did not affect to make this insurance in their own right, but as trustees for those persons who should be eventually entitled to it. Therefore I am of opinion that the declaration is sufficient.

GROSE, J.:

I do not agree with my brother ASHHURST in one part of his opinion, namely, that the property in these ships was in the Crown, because the property could not be altered before condemnation.

The first question in this case is, Whether or not the plaintiffs had an insurable interest in the ships and goods insured? Now they were either trustees, consignees, or agents, for those who might eventually be entitled to the produce. If they were trustees or consignees, it seems admitted that they [25]

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might have insured. And if they be considered as agents, then they had an insurable interest, according to the decision in the *Omoa* case. As to the other question, whoever reads the stat. 19 Geo. II. must see what the law was before the passing of that Act. Before that time a wagering policy was not illegal. The words of that statute clearly shew that before that time any person might have insured without interest; therefore it is not necessary to aver interest in any case not prohibited by that Act; and this case does not come within the prohibition of that Act, because it was an insurance on foreign ships.

LAWRENCE, J.:

With regard to the supposed contradiction on this declaration, the argument is thus; by a reference to the introductory part of the declaration, which applies to all the counts, it appears that the ships and goods were the property of the Crown; and therefore it is a contradiction afterwards to say that they were not the property of his Majesty, or any of his subjects. But the foundation of that argument fails; for it only appears that they were taken by his Majesty's ships, and were in the possession of the Crown, without shewing that the Crown had any right to them; which certainly does not amount to an averment that the property was in the Crown; and that which is taken by the Crown not in a state of hostility, does not thereby become the property of the Crown. On the other parts of the case, I need only say that I agree with the rest of the Court.

Judgment for the plaintiffs.

Note.—The above case must be read in connection with *Lucena* v. *Craufurd*, 3 Bos. & P. 75, and 2 Bos. & P. N. R. 269 (reported in 6 R. R.). In that case, on the facts which were disclosed at the trial, it was considered by the House of Lords that the Commissioners had not an insurable interest. The judgments, however, in the above case on the facts as appearing by the declaration are frequently cited in cases relating to insurances by factors. See *Ebsworth* v. *Alliance, &c. Co.* (1873) L. R. 8 C. P. 596, 623; 42 L. J. C. P. 305. The authorities will be more fully referred to in a note to *Lucena* v. *Craufurd*.—R. C.

HOWTON *v.* FREARSON.

(8 T. R. 50—56.)

1798.
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[50]

Where one as a trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity, as incidental to the grant; if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved to him by operation of law.

To trespass, for breaking and entering the plaintiff's close, called the Allotment at Ockbrook, in the county of Derby, on the 1st of January, 1796, the defendant pleaded, 1st, The general issue; on which issue was joined: Secondly, [in effect that the defendant was entitled to a necessary way from his close called the Upper Meadow over the plaintiff's close called the Allotment to a certain highway].

On the trial at Derby, a verdict was found for the plaintiff, [51] subject to the opinion of this Court on the following case:—

Previous to the inclosure of the open fields and meadows in the liberty of Ockbrook, in the county of Derby, in the years 1772 and 1773, the lands within the liberty consisted of old inclosures, three open arable fields, called Upper Field, Draycot Field, and Burrowash Field, a meadow called Ockbrook, divided into several parts, one of which was called Upper Meadow, and certain common grounds lying in the said open fields. The Upper Meadow was bounded on the north by old inclosures, then and now called Reedy Pieces, and part of the then said open fields called Upper Field; on the east, by an old inclosure called the Carr, another then open field called Draycot Field (being the plaintiff's land called by that name in the pleadings) and other old inclosures; on the south, by old inclosures; and on the west, by the said then open field called Burrowash Field. The *Upper [*52] Meadow belonged to several proprietors, who had distinct interests therein until the crop was got, and afterwards they depastured the land in common. The road to the Upper Meadow was at that time out of a highway called Collion Lane † over the east side of that part of the then open field called

† Collion Lane ran from west to east, by the north side of Reedy Pieces.

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Burrowash Field, marked No. 75, in the plan,† annexed into and over the east side of an old inclosure, marked in the plan No. 76, called Hillsway Close, into the corner of another part of the said Burrowash Field, marked in the plan No. 77, and from thence into the said Upper Meadow. In the year 1772, an Act of Parliament passed for dividing and inclosing several open fields, &c., in Ockbrook, by which the commissioners named therein were directed and empowered to set out public and private carriage bridle and footways over the lands and grounds thereby directed to be divided and inclosed, to any allotments to be made by virtue thereof, or to any old inclosures, &c., for such uses and purposes as the said commissioners should, in their award, order and direct. And by that Act it was also enacted, that it should not be lawful for any person or persons, after the execution of the award, to use or claim the use of any roads, or any ways, either old or new, public or private, over, within, or through the lands and grounds thereby intended to be divided, &c. either on foot or with horses, &c. other than such roads or ways as should be so set out and appointed by the commissioners; and that all former roads or ways, or so much thereof as should not be so set out and appointed as roads, should be deemed part of the lands to be divided and inclosed. At the time of the inclosure, S. Dalby, widow, was seised for her life of an estate in the liberty of Ockbrook, consisting of old inclosures and lands in the open fields and meadows; which estate was limited in remainder, after her decease, to her son, J. J. Dalby, in tail; and J. J. Dalby was also entitled in possession to an estate in Ockbrook; which, upon his marriage, were settled upon himself and wife for their lives, with remainder to their first and other sons in tail. The commissioners, by their award, dated the 22nd of January, 1773, allotted and awarded unto S. Dalby (in lieu of her lands in the open fields) in severalty, the Upper Meadow, and that part of Draycot Field which adjoins to it, and now belongs to the plaintiff. The lands so allotted to her lie con-

[*53] tiguous to each *other, and the east side of the said allotment, in

† No. 75 and 76 adjoined the Reedy Pieces on the west, and No. 77 was to the west of Upper Meadow; and the road described in the plan came into the north-west corner of Upper Meadow.

Draycot Field, as well as an ancient inclosure (called the Carr Close) belonging to S. Dalby, and adjoining to the Upper Meadow, is bounded by a public highway leading from Draycot to Ockbrook. The commissioners did not set out or appoint any road whatsoever to the Upper Meadow, or the other lands allotted to S. Dalby. The road used previous to the inclosure, and when the open fields were in tillage, out of Collion Lane to the Upper Meadow, as before stated, was not set out, or awarded by the commissioners; but they set out and awarded a road to the occupiers of the Reedy Pieces in these words: "One other private carriage and drift road from Collion Lane into and over the east side of the lands allotted to Dame Mary Lake, No. 75, to an old inclosure allotted to J. J. Dalby, No. 76, for the use of the owners and occupiers of several old inclosures, called the Reedy Pieces, for ever."—As soon as the allotments were set out, J. J. Dalby began to occupy (as tenant to his mother) that part of the allotment in the Upper Meadow which now belongs to the defendant. About the same time, he agreed with the proprietors of the old inclosure, No. 76, for the exchange of other lands (to which he was entitled in possession as aforesaid) for the old inclosure; and the exchange was carried into effect by the award of the commissioners under a power in the Inclosure Act. Mrs. Dalby died in April, 1786; and upon her death J. J. Dalby became entitled in possession, as tenant in tail to the lands which had been allotted to her; and in Trinity Term in that year suffered a recovery of the same, and limited it to himself in fee. J. J. Dalby died in October, 1792; and from the date of the award to the time of his death, that part of the Upper Meadow which now belongs to the defendant, and the said ancient inclosure, No. 76, were occupied by the same tenant, by himself, for six years, and by S. Phipps for the remainder of the time, without any connection in respect of roads with the other lands allotted to Mrs. Dalby, and now belonging to the plaintiff. And although the use of the road set out by the commissioners, and awarded over the new inclosed lands, No. 75, was limited by the award to the Reedy Pieces, J. J. Dalby and his tenants of the old inclosure, No. 76, and the defendant's Upper Meadow, made use of the said road for all purposes whatsoever, as a road to the

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said inclosure, No. 76, and the defendant's Upper Meadow, during the whole of the above-mentioned period. Upon the death of J. J. Dalby, his eldest son became entitled, under his [*54] father's marriage *settlement, to the old inclosure No. 76; and at Lady-day, 1793, sold and conveyed it to J. Elliot, the present owner thereof. J. J. Dalby, by his will dated 26th January, 1791, devised all the lands so allotted to his mother to trustees (of whom the plaintiff is one) for the sale thereof; and in April in that year the plaintiff purchased and became possessed of the said close called the Allotment, and the close called Draycot Field, and also the close called Carr Close. In July following, the defendant purchased of the said trustees the close called the Upper Meadow, with all ways, &c. belonging thereto. Very soon after the defendant had made this purchase, J. Elliot and the owners of the new inclosure No. 75, stopped up the road over their respective lands to the Upper Meadow. The question is, Whether the plaintiff is entitled to recover?

This case was argued at length in Trinity Term last, by *Burton Morice* for the plaintiff, and *Clarke* for the defendant.

The former then contended that, when a man grants land without reserving to himself a right of way over it, the law will not reserve such right for him, however necessary or convenient: and the defendant claiming under a person so circumstanced, cannot be in a better situation. *Dell* v. *Babthorpe*, Cro. Eliz. 300. (LAWRENCE, J. observed, that it did not there appear to be necessary to go over the close in question to the wood; there might be another way to it). [He also cited *Oland's* case, 5 Co. 116; 1 Rol. Abr. 726; *Keymer* v. *Summers*, Hereford Sum. Ass. 1769, cor. Yates, J., Bull. Ni. Pri. 74.]

[55] *Clarke*, for the defendant:

* * The claim of a way of necessity as given by law, is expressly recognised in the case cited of *Clark* v. *Cogge*, Cro. Jac. 170; in *Staple* v. *Heydon*, 6 Mod. 3, 4; and 1 Rol. Abr. 936, pl. 10; and it was expressly determined to be good in *Dutton* v. *Taylor*, 2 Lutw. 1487, because, as it is there said, it is for the public good that the land should not be unoccupied. Besides, in

this case the defendant claims under a grant from several persons, one of whom was the plaintiff himself; and therefore on the ground admitted in argument, the plaintiff must be taken to have granted this necessary way.

Lord KENYON, Ch. J. entertaining great doubt upon the general question, desired that the case might be argued again. But on this day, when [56]

Perceval was to have argued for the plaintiff and *Balguy* for the defendant,

LORD KENYON, Ch. J. said:

Upon further consideration, I find it impossible to distinguish this from the general case, where a man grants a close surrounded by his own land (in which case the grantee has a way to it of necessity over the land of the grantor) merely on the ground that the plaintiff conveyed to the defendant in the character of a trustee; for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such a way of necessity upon the authority of all the cases, upon the principle that every deed must be taken most strongly against the grantor. It was competent to those who conveyed to the defendant, when they granted the Upper Meadow, to grant him a way to it over their own land. When they made the conveyance, it must be taken for granted that they intended to confer some beneficial interest; but he can derive no benefit whatever from the grant unless he has a right of way to the land. Even upon the general ground, I was prepared to submit to the express authority of the case in Lutwich, though I cannot say that my reason has been convinced by it. There are I think great difficulties in the question; but in the other mode of considering the case, those difficulties are gotten rid of altogether; and it falls within all the authorities which are not controverted even by the plaintiff.

Per CURIAM:

Postea to the defendant.

1798.
Nov. 23.

[57]

DOE, ON THE DEMISE OF MITCHINSON, *v.* CARTER.

(8 T. R. 57—64.)

SAME *v.* SAME.

(8 T. R. 300—302.)

A lessee, who had covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; held no forfeiture of the lease.* But, if the warrant of attorney has been given for the express purpose of enabling such creditor to take the lease in execution under the judgment; this is in fraud of the covenant: and the landlord, under a clause of re-entry in the lease for breach of the condition, may recover the premises in ejectment from a purchaser under the sheriff's sale.

ON the trial of this ejectment at the last assizes for Essex, before Mr. Justice Buller, a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on the following case:—

The lessor of the plaintiff, being seised in fee of the premises in question, demised the same by lease, dated the 28th of September, 1784, to J. Braban; in which lease there is the following covenant and proviso: That Braban, his executors, administrators, or assigns, should not let, set, assign, transfer, make over, barter, exchange, or otherwise part with this indenture or the said messuage, lands, &c. hereby demised, or any part thereof, to any person or persons whomsoever, for all or any part of the said term, without the special license, consent, and approbation of Mitchinson, his heirs or assigns, in writing; provided always that if Braban, his executors, administrators, or assigns, or any of them, should let, set, assign, transfer, or make over this indenture or the said premises hereby demised, or any part thereof, to any person or persons whomsoever, without the license or consent of Mitchinson, his heirs or assigns, in writing; or if all or any of the covenants, &c. on the part of Braban, his executors, &c. should not be by him or them paid, observed, &c. according to the true intent, &c. in either of those cases it should

* This is confirmed by *Croft* v. *Lumley* (1857) 6 H. L. C. 672, 27 L. J. Q. B. 321.—R. C.

be lawful for Mitchinson, his heirs and assigns, into and upon the said messuage or tenement, farm, lands, &c. wholly to re-enter, &c.

Braban entered into possession of the premises under this lease, and continued possessed of them until the entry of the defendant hereafter mentioned. A creditor of Braban for a just debt took from him a warrant of attorney to confess judgment; upon which a judgment was accordingly entered up as of Michaelmas Term, 1797. Execution issued in the same term, and the lease was on the 11th of December, 1797, sold under such execution by the sheriff to the defendant; who was put into possession on the 1st of January, 1798, and now continues so possessed. The defendant at the time of his purchase knew that the lease contained the said covenant and proviso.

Best for the plaintiff: [58]

The lessor of the plaintiff is now entitled to recover, under the proviso against alienation contained in the lease. A landlord in granting a lease to a particular tenant has two objects in view; the one to secure his rent; the other to provide that the estate shall not be deteriorated in the hands of the tenant; and therefore in granting a lease he selects a tenant in whom he has confidence, and in whose occupation (he supposes) both these objects will be secured. But unless he has the means of preventing the tenant alienating, both those objects may be defeated. Covenants and conditions of this kind have always been construed strictly. *Berry* v. *Taunton*, Cro. Eliz. 331; *More's* case, Cro. El. 26; *Philpot* v. *Hoare*, 2 Atk. 219. Though the case of *Roe* v. *Galliers* * is different from the present, because there the question arose on the legality of a proviso in the lease, that the landlord should re-enter on the tenant's committing an act of bankruptcy, which was holden to be a legal condition, yet the reasoning of the Court there is applicable to this case; and the case of *Dommet* v. *Bedford* † goes the whole length of deciding the present case. There Bedford gave an annuity to Woodham to be paid into his own hands, "it being the intent of the testator that, if the same should be alienated, the annuity should immediately cease and determine;" and on the bankruptcy of Woodham and an assign-

* 2 T. R. 133; 1 R. R. 445. † 6 T. R. 684.

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ment of the annuity by his commissioners to the assignees, it was holden that the annuity ceased, though it was argued that the restriction only extended to an assignment by the party himself. In truth, what is called an assignment by operation of law, is only such an assignment made by the authority of the law that the party himself might have made. Now as the tenant himself could not have assigned in this case, on the principle that *lex nemini facit injuriam*, the law will not assign for him. In cases of bankruptcy the assignees only stand in the same situation as the bankrupt himself did; neither is the sheriff placed in a better situation than the tenant whose interest he takes in execution. But even if the Court were to decide that such a proviso as the present did not extend to an alienation by law, to an execution against the goods and chattels of the tenants, still in this case there was no adverse judgment; the tenant voluntarily executed a warrant of attorney to confess a judgment for him. And unless
[*59] the landlord can enter as for a *breach of this condition, it will enable a tenant to do that indirectly, and perhaps fraudulently, which he cannot do directly; since, instead of assigning over a lease to a third person, he may confess a judgment to him for the very purpose of enabling such third person to take the lease under an execution upon the judgment.

Parnther, contrà:

It may be admitted that the parties may covenant, that on the event of the insolvency of the tenant the landlord may re-enter, if they choose to frame a specific covenant for that purpose; but the objection to the lessor's right of entry here is, that no such covenant is contained in this lease. All the words of this proviso are applicable only to an assignment by the party himself. In cases of this kind the Courts have in general been inclined to narrow the construction of covenants against alienation, at least not to extend them beyond the words of the covenant. In *Crusoe* v. *Bugby* † it was holden that a covenant not to assign, transfer, set over, or otherwise do or put away the lease or premises, did not extend to an underlease for part of the term. So in *Fox* v. *Swann*, ‡ where the lessee covenanted not to assign without the

† 2 Bl. Rep. 766; and 3 Wils. 234. ‡ Sty. 483.

lessor's consent, it was said that a devise of the term by the lessee was not a breach of the covenant. In the case of *Denn* d. *Lord Stanhope* v. *Skeggs*,† where the lessor having demised to the lessee for twenty-one years, habendum to him, his executors, administrators, and assigns, with a proviso that the landlord might re-enter if the lessee, his executors, &c. should assign, &c. or suffer the same to be extended or taken in execution, the question was, Whether, notwithstanding the proviso the land could be taken in execution against the executor of the lessee? and it was admitted by the plaintiff's counsel that the covenant not to assign, &c. did not extend to assignments by operation of law. Lord MANSFIELD's opinion, and the result of the enquiries directed by him in that case, also confirm the doctrine, That without an express covenant that the lease should be void on the bankruptcy or insolvency of the lessee, the lease would continue in force. And it appeared there that, in the leases granted by the Accountant-General of the Court of Chancery of the estates of lunatics, a covenant was inserted to vacate the lease on the bankruptcy or insolvency of the lessee. If, instead of a proviso for re-entry in this case, a pecuniary penalty had been annexed to the breach of the condition, *no action could have been maintained for such penalty, because the judgment, execution, and sale of the lease by the sheriff, are all hostile acts done by the operation of the law *in invitum*. Then the same rule ought to govern this case, which is the case of a forfeiture. "Cases of forfeiture are not favoured in law;" per Lord MANSFIELD in Cowp. 805. That such a restraining covenant as the present does not extend to assignments by operation of law, is clear from the case of *Goring* v. *Warner*,‡ where Lord MACCLESFIELD ruled, That assignment by the commissioners of bankrupt (lessee) was no breach of the lessee's covenant not to assign.§ Now, if that be the general rule, there is no reason to make an exception in the present case on account of the lessee's having given a warrant of attorney to confess a judgment on which this lease was taken in execution, since that would be to compel a debtor to incur all the expense of a fruitless litigation in attempting to resist a

[*60]

† E. and Tr. 21 Geo. III. B. R.

‡ 2 Eq. Cas. Abr. 100, pl. 3.

§ Vide *Philpot* v. *Hoare*, 2 Atk. 219; Amb. 480.

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demand which he knows to be just. If it be objected that the case of *Goring* v. *Warner* cannot be supported, because the reason given for its decision (namely, that the assignment by the commissioners was made by the authority of a statute, which will supersede any private agreement between the parties) was overruled in the case of *Roe* v. *Galliers*, it may be answered, That the former decision is right, though the reason given for it is bad. Both those cases may stand on their own foundation. In the former there was no proviso to re-enter on the lessee's becoming a bankrupt or insolvent, and therefore the assignment under the commission of bankrupt was valid: in the latter there was such a proviso; which was holden to be good in law. This case is clearly distinguishable from that of *Dommet* v. *Bedford*, where it appeared to be the intention of the testator that the annuity given to the annuitant (bankrupt) should absolutely cease and determine as soon as he should be in a situation not to receive the benefit of it himself.

LORD KENYON, Ch. J.:

Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant. In the case of *Lord Stanhope* v. *Skeggs*, Lord MANSFIELD seems to have doubted on this ground, whether or not the covenant that the executors of the tenant should not assign were void, as being inconsistent with the thing granted: but in so doubting, his

[*61] Lordship probably overlooked the maxim *Modus et *conventio vincunt legem;* though indeed that maxim is to be taken with some qualification; for a grantor when he conveys an estate in fee, cannot annex a condition to his grant not to alien, nor, when he conveys an estate tail, a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities: but, short of that restriction, both parties to a contract may model it in what manner they please. Though therefore the grant of an estate *primâ facie* carries with it all legal incidents, that grant may be modified according to the wish of the parties; and when we are considering the rights of the grantee, it is necessary to see what restraints have been imposed on him. That covenants

may be introduced into a lease to prevent the term passing under a commission of bankrupt, or being taken in execution against the tenant, seems to be admitted; and I know that such covenants are now become very usual. In the case of *Crusoe* v. *Bugby*, Lord Chief Justice DE GREY said that the Courts of Westminster have always watched with a great deal of care, to see if the particular case fell within the restraint imposed upon the tenant; if not, the party has those legal incidents belonging to the estate, and may dispose of it. Now, what are the words used in this lease; that the lessee shall not let, set, assign, transfer, make over, barter, exchange, or otherwise part with, the indenture or the premises demised; but these are all acts to be done by the tenant himself; and I adopt the distinction relied upon by the defendant's counsel between those acts, That the party does voluntarily; and those that pass *in invitum*: judgments in contemplation of law always pass *in invitum*; and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expense of the proceedings. If the warrant of attorney itself had been a specific lien on the estate, that perhaps would have come within the words of this covenant: but it only gave the creditor power to enter up judgment against the tenant, and, *non constat*, that it would be followed up by the term being taken in execution under that judgment. Unless we were to carry this farther than the words, I do not think that this was an alienation within the meaning of the covenant. In the course of the argument it was said, that the granting of a lease was a stipulation of confidence: as between the parties themselves it is so, so much that the tenant's liability on his covenant *to pay rent, subsists during the continuance of the [*62] lease, notwithstanding he may become a bankrupt and be deprived of all his property: but there is no personal confidence in the assignee of the lessee; and when he parts with the lease he also gets rid of his liability. On the whole, therefore, I cannot forbear thinking (and I have turned it again and again in my mind) that this is not a breach of the condition or proviso for re-entry, the term having been taken in execution against the

DOE d. CARTER. tenant *in invitum*. If I entertained any doubts, I should wish to hear the case argued again; but I confess I have for some time considered this point as being at rest.

ASHHURST, J.:

There are so many difficulties in the case, that I wish to have it further considered. There seems to be a hardship on each side; on the landlord, who may lose the tenant in whom he placed confidence; and on the creditor of the lessee, who perhaps gave him credit on his possession. The present inclination of my opinion is, that this is not a breach of the condition: but I desire time to consider of the case.

GROSE, J.:

The cases upon this subject do not quite agree in deciding what is a breach of a condition of this kind. The words in this covenant rather point to some act to be done by the tenant himself: but the giving of a warrant of attorney did not specifically operate on this property. If it had been given for this purpose, perhaps in equity it would have been considered as a fraud on the covenant in the lease. But the material consideration here is, that there is no proviso that the lease shall be void in case of the insolvency or bankruptcy of the lessee; and as such a proviso is frequently inserted in modern leases, the omission of it in this case is strong, to shew that the parties did not intend that this should be a forfeiture of the lease. In *Crusoe* v. *Bugby*, the Court said that "the lessee becoming a bankrupt, was a doing or putting it (the term) away;" so "being in debt by confessing a judgment, and having the term taken in execution, was the like;" but said that "none of these amounted to an assignment." Now if the words in this proviso were only inserted to guard against an assignment by the party himself (and it seems to me that they were) then, according to the above case, there has been no assignment in this case, and consequently no breach of the condition.

LAWRENCE, J.:

If the Court should ultimately be of opinion that this is not

a forfeiture of the lease, and I think that is the *better opinion, this will be the first case in which the point is so decided. This question has been agitated at various times. So far back as in Dyer 6, *a*, there is this note in the margin: "A man leased for years, upon condition that the lessee should not assign it over: the lessee acknowledged a statute; the term is extended; Walters cited this, Resolved to be a breach of the condition, although they come in in the *post*, and by act of law." In the case in 1 And. 124, there was a difference of opinion among the judges; it was said by one of them, that if land be leased on condition not to assign, and the lease be taken in execution, by reason of a judgment or recognizance, it is not a forfeiture: but this was denied by another of the judges, who said that the execution was itself a forfeiture; to which the reporter adds "which is hard, as it seems." The same case is also reported in 1 Leon. 3; according to which PERIAM, J. and MEADE, J. held that it was not an alienation against the condition. In 2 Leon. 83, where a man devised lands to his wife until his son William attained the age of twenty-two, and then the remainder of part of the lands to his two sons A. and John, upon condition that if any of his sons should sell any part before William attained the age of twenty-two, he should lose the lands, &c. it was said, "If the devisee had entered into a statute to the value of the land leased, by the intent of the will the same had been a sale; and such was the opinion of the whole Court." These are the earliest cases on this subject; the later cases have been mentioned in the argument. That of *Goring* v. *Warner*, which was cited from 2 Eq. Cas. Abr. 100, is also in 7 Vin. Abr. 85, pl. 9; where Lord MACCLESFIELD said, "I do not think this is a breach of the proviso or condition at law; but whether it be so or not, I think this is a proper case for relief in a court of equity." The case of *Dommett* v. *Bedford* is very distinguishable from the present; for there it was the testator's intention that the annuity should be paid to the annuitant so long only as the latter should be able to receive it; and when the bankrupt could no longer receive it, there was an end of the term for which the annuity was given. With regard to the case of *Roe* v. *Galliers*, it was directly contrary to the opinion given

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by Lord MACCLESFIELD in *Goring* v. *Warner*, because it was there holden, that a covenant that the lease should be void in case the lessee became a bankrupt, was good. Now, looking through all these cases, it does not appear that this precise point

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has been decided. According *to what was said in *Crusoe* v. *Bugby*, this would be a putting away, or parting with, the estate, and then it would be a forfeiture: but if the Courts rather lean against such restraining covenants and conditions, then I think there is no forfeiture in this case, because all the words used in this lease point at some act to be done by the tenant himself. If it had been stated that the warrant of attorney was given for the express purpose of having the term taken from the tenant, it would have been a forfeiture of the lease; but the mere giving of a warrant of attorney does not imply that such was the tenant's object; it might as well be argued that the giving of a bond, which might lead to a judgment and execution on which the term may be taken, was a forfeiture.

On the whole, therefore, I think that the safest way of deciding this question is to look on the terms of the lease; and according to those, it does not appear that the tenant has done any act to create a forfeiture. This determination will not be productive of any mischievous consequences, because the parties may always stipulate (if they please) that the lease shall cease and be determined, in case of the bankruptcy or insolvency of the lessee. And though at first I had some doubts on this case, I have now no hesitation in agreeing that there must be judgment in favour of the defendant.

ASHHURST, J. then expressed himself satisfied with the reasons given by the Bench, and added, that he concurred in opinion with the rest of the Court.

Postea to the defendant.

1799. *June* 7.

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On ejectment between the same parties tried at the ensuing assizes for Essex, before Perryn, B. a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court, on a case which stated the same facts verbatim, as in the above report, with this addition, That "the warrant of attorney was executed for

the express purpose of getting possession of the lease; which was not to be had, because it was in the teeth of a covenant directly to the contrary; and Braban concurred in that intention."

Best, for the lessor of the plaintiff, said, That this differed from the case before determined between the same parties; because here the jury found as a fact, that the warrant of attorney was executed for the express purpose of getting possession of the lease. This therefore was an act in fraud of the covenant; and which LAWRENCE, J. observed, in the former case, would amount to a forfeiture of the lease by the tenant. He was then stopped by the Court.

Parnther, contrà:

It does not follow, because the warrant of attorney was executed for the purpose of the tenant's creditor getting possession of the lease, therefore it was in fraud of *the covenant. Fraud cannot be inferred by the Court; it must be specifically found; and it is not found in this case. If, indeed, there had not been a *bonâ fide* debt before due from the tenant to his creditor, but that had been set up as a pretence on which to give the warrant of attorney, and found the subsequent proceedings, fraud might justly be imputed; but as there existed a *bonâ fide* debt, the judgment on the warrant of attorney is as much *in invitum* as if no such warrant of attorney had been given; and so it was considered by Lord KENYON in the former case. The warrant of attorney was extorted from the debtor by reason of his necessitous situation; and if he had no other property, except this lease, which could be taken in satisfaction of the debt, the parties could not but intend that it should be taken, without any idea of acting in fraud of the covenant. The warrant of attorney itself gave the creditor no specific lien on this estate, which alone was before considered, by Lord KENYON, as falling within the words of the proviso; but, as his Lordship observed, it only gave the creditor a power to enter up judgment against the tenant; and, *non constat*, it would be followed up by the term being taken in execution.

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LORD KENYON, Ch. J.:

When this case first came before the Court, the rules that were likely to govern it were so explicitly stated, that I thought we should have heard no more of it. The covenant not to assign, and the proviso to enforce it, were both legal at the time; and indeed it was prudent for the landlord to take this care that an improper tenant should not be obtruded on him. When the former question arose, the Court, to a certain degree, relaxed the severity of the covenant; and they then said, there was no forfeiture, because all that was stated was, that a fair creditor had used due diligence to enforce the payment of a just debt, and that the lease was taken from the tenant against his consent, by judgment of law. But when it is now stated that this step was taken for the express purpose of getting possession of the lease, and that the tenant consented to it, it would be ridiculous to suppose that a Court of Justice could not see through such a flimsy pretext as this. Here the maxim applies, That that which cannot be done *per directum*, shall not be done *per obliquum*. The tenant could not, by any assignment, under-lease, or mortgage, have conveyed his interest to a creditor; and consequently he cannot convey it by an attempt
[*302] of this kind. If the lease had been *taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture; but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor.

GROSE, J.:

No man can avail himself of his own fraud to avoid the law. We have instances, even in the criminal law, where a man shall not be permitted to avoid the law by fraud. The definition of burglary is a breaking and entering a house in the night-time, with intent to commit a felony; and if a man, under the pretence of serving an ejectment, get into a house in the night-time for the purpose of a robbery, it is burglary, though, in point of fact, there be no breaking. Now here the tenant did not, in terms, assign the lease, but he did that which was

equivalent: it was an attempt to evade the covenant, and was intended as a fraud on the landlord.

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LAWRENCE, J.:

The defendant contends that this case does not substantially differ from the former case, because he says that, notwithstanding what is here stated, this was a proceeding against the tenant *in invitum*. But how can it be considered to be *in invitum*, when it is stated, that the warrant of attorney was executed for the express purpose of getting possession of the lease, which could not otherwise be obtained, and that the tenant concurred in that intention? The parties were aware that this lease could not be directly assigned by the lessee in satisfaction of his debt, and therefore they agreed to do that by the appearance of an adverse judgment which, by their own act, they could not effect; so that it was to appear to be done *in invitum*, when, in truth, it was done voluntarily.

Postea to the plaintiff.

M'ILEHAM *v.* SMITH.

(8 T. R. 86.)

1798. *Nov.* 24.

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A rule *nisi* for an attachment for non-payment of money, pursuant to the Master's allocatur, cannot be served on a Sunday.

THIS was an application for an attachment against the defendant for non-payment of the balance of an attorney's bill, pursuant to the Master's allocatur, under the usual reference, by a judge's order.

Garrow, who now shewed cause against the rule, objected to the service of it, because it was made on a Sunday.

Lawes contended that the service was sufficient; 1st, Upon the ground of necessity; the affidavit of service stating that repeated endeavours, both before and after the service, had been used to serve the party without effect; and that he kept out of the way on purpose, to avoid the service. 2dly, That the rule *nisi* was a proceeding of a criminal nature, and might therefore

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be served on a Sunday; 12 Mod. 348, and 2 Ld. Raym. 1028. He also contended, that this not being the case of an actual arrest, or of the service of any writ or process, was not within the statute 29 Car. II. c. 7, s. 6; that statute making the writ void, and subjecting the party executing it to an action at the suit of the party grieved, as if he had acted without any writ, &c. *Wilson* v. *Tucker*, Salk. 78; whereas in the present case, the rule *nisi* would still be an existing and a valid rule, and no action could be maintained for the mere service of it. But

LORD KENYON, Ch. J.:

After adverting to the statute, and expressing an anxious wish to preserve as much as possible a strict attention to the Sabbath, said that the statute of Car. II. was equally applicable to the case of a service* of process as to an actual arrest; and that the rule in the present case was a proceeding within the Act.

The rest of the Judges concurring,

Rule discharged.

1799. *Jan.* 24.

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K. B. HILARY TERM.

D. BLACHFORD AND ANOTHER, EXECUTORS OF G. BLACHFORD, *v.* PRESTON.

(8 T. R. 89—95.)

A sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge of the Company, is illegal; and the contract of sale cannot be the foundation of an action.†

THIS was an action of assumpsit, on an agreement entered into between the testator and the defendant on the 1st of July, 1786, in which, in consideration that the testator had paid to

* By the stat. 29 Car. II. c. 7, s. 6, it is enacted, that "no person upon the Lord's day shall serve or execute any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace," &c.

† In *Card* v. *Hope* (1824) 2 B. & C. 661, the same principle was applied to a sale of shares in an East Indiaman with a stipulation that a certain person should be appointed to the command; and an opinion was strongly expressed that the principle would apply to any ship.—R. C.

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the defendant 5,000*l.* for the command of a ship called the *Foulis*, in the East India Company's service, the defendant promised to pay to the testator in his lifetime, or to his executors after his decease, the sum of 5,000*l.* "upon the appointment of another person to succeed him (the testator) in the command of the said ship, or of any other ship that should be thereafter built on the same bottom, in lieu and stead of the testator." The declaration, after setting forth the agreement, stated that the testator died on the 8th of March, 1792, and that afterwards, on the 8th of July, 1795, another ship was built on the bottom of the *Foulis*, called the *Cirencester*, to which M. Lindsay was appointed as the commander, in lieu and stead of the testator; but that the defendant on such *appointment refused to pay the [*99] sum of 5,000*l.* to the plaintiffs, the executors. The second count stated the agreement thus: That the defendant promised that the testator in his lifetime, or his executors after his death, should receive 5,000*l.* from the person appointed to succeed him in the command of the *Foulis*, or of any other ship that should thereafter be built on the same bottom, in lieu of the testator. The third count alleged that the agreement was, "that the defendant should pay such sum and sums of money and securities for money not exceeding 5,000*l.* as he (the defendant) should receive from the person appointed to succeed the testator in the command of the *Foulis*, or any other ship," &c. &c.; averring that M. Lindsay was appointed, &c. from whom the defendant received 2,500*l.* in money and a bond for the payment of another sum of 2,500*l.* which he (the defendant) had refused to pay and deliver to the plaintiffs, &c.

At the trial before Lord Kenyon at the Sittings in London, the case appeared to be this:—In the year 1783, the testator was appointed to the command of the *Foulis* East Indiaman, on the recommendation of the defendant, the husband or managing owner; for which he paid the defendant 5,000*l.* On his appointment he and the defendant entered into a charter-party with the East India Company, in which it was agreed that "neither he nor the defendant should sell, or permit or suffer any other person to sell to the master, or any other officer of the ship, his or their place or office, or take any promise or reward for or

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in respect of any place or office in or belonging to the ship," &c. In 1791 the *Foulis* was lost at sea, with the captain on board, in her passage from Madras to Bencoolen. In 1794 the defendant obtained leave from the East India Company to build another ship, (the *Cirencester*) in lieu and on the bottom of the *Foulis*, and appointed Captain Lindsay to the command, in consideration of 2,500*l*. paid in money, and of a bond for 2,500*l*. more, which he (the defendant) afterwards paid to the widow and children of Captain Blachford, not to the plaintiffs his executors. For a long time prior to the testator's appointment to the *Foulis*, it had become usual for the captains of East India ships to purchase their commands, though it was contrary to the bye-laws of the Company. In February, 1796, the Court of Directors came to a resolution, which was afterwards confirmed by the proprietors, to abolish the practice, "long known to have been privately carried on, and at last publicly avowed, of the
[*91] sale of commands," and to make a pecuniary *compensation to those who had paid for their commands. And in consequence of this the Company afterwards allowed Captain Lindsay 4,833*l*., as a compensation for what he had paid to the defendant. Under the above resolution the Company also made allowances to the executors of some late commanders. There was no written contract between the testator and the defendant, but it seemed admitted that the former had paid the latter 5,000*l*. under a promise that it should be returned when his successor was appointed. A verdict was taken for the plaintiffs, damages 4,833*l*. with liberty to the defendant to move to enter a nonsuit, if this Court should be of opinion that the plaintiffs were not entitled to recover.

Such a rule was accordingly obtained in last Easter Term, on the ground that the contract on which the action was founded was illegal, because it was not only contrary to the bye-laws of the East India Company, and to the charter-party which had been executed both by the testator and the defendant, but was also inconsistent with public policy. The case was shortly spoken to in last Trinity Term: but its further discussion was then postponed, under an expectation that a compromise would take place. That failing,

Erskine, *Gibbs*, and *Skermer*, now shewed cause against that rule.

1st. It is too much for the defendant to contend that this contract is void, as having been entered into contrary to the bye-laws of the East India Company, because the agreement was founded on a practice that had universally obtained for a long period, and that prevailed even with the knowledge of the East India Company, who so lately as the year 1796 (subsequently to the time when this transaction took place) came to certain resolutions on the subject, with a view of making a pecuniary satisfaction to those captains who had purchased their commands on the strength of the usage. 2dly. Still less ground is there for saying that this contract is void because contrary to the stipulations of the charter-party, for the contract was entered into before the charter-party was in existence. 3dly, Nor can it be said that the agreement is illegal and void as being against the principles of sound policy; for though it may be admitted that there are other offices, besides those that are enumerated in the stat. 5 & 6 Ed. VI. c. 16, that cannot legally be sold, they must be offices respecting which the public are concerned. But the employment in question does not concern the public, but is a mere private appointment by a great commercial company. But even if this contract were illegal on *either of the above grounds, still it must be observed that the [*92] plaintiffs do not come to enforce the illegal contract: that agreement has been executed, and this action is brought against the defendant to recover the money that he has received. It is admitted that he received this money not for himself, but as a trustee under his contract with the testator; and having so received it after the testator's death, he must be taken to have received it for the legal representatives of Captain Blachford.

LORD KENYON, Ch. J. (stopping the counsel on the other side):

There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*: on principles of public policy no money-consideration ought to influence the appointment to such offices. This principle was much considered by the late Lord Chancellor

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THURLOW, in a case that came before him on an injunction bill, where a noble Lord having, in consequence of his own office in the King's household, recommended another person to the appointment of another place in the household, and having made that recommendation in consideration of an annuity to be granted to a third person, not to himself, the contract was considered as illegal; and a perpetual injunction was granted to the party suing on that contract in a court of law.† Up to a certain extent the Legislature have interfered and prohibited (by the stat. 5 & 6 Ed. VI.) the sale of some offices; but whether or not that Act of Parliament were necessary for the purpose, I will not now inquire. If the contract, which is the foundation of this action, were legal, and the question were, Whether the executors or the widow of the late Captain Blachford were entitled to the money in dispute? the right of the former must have prevailed. But a plaintiff who comes into a court of justice to enforce a contract, must come on legal grounds; and if he have not a legal title, he cannot succeed, whatever the private wishes of the Court may be. In this case the plaintiffs have relied on the practice that (as it is said) had so long prevailed of selling the commands of ships: but that practice is in violation of the laws and regulations of the East India Company. And it appeared in this case that in the year 1783 a charter-party was entered into, to which the plaintiff's testator, the defendant, and the East India Company, were parties, and by the express stipulations of that contract it was agreed that no place or office

[*93] in the ship should be sold. I may again resort to *that with which I set out, that public policy requires that there should be no money consideration for the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons. The East India Company is a limb of the government of the country; and on the ground that this contract was a fraud on the E. I. Company, from which much mischief to the public may ensue I am of opinion that it cannot be made the basis of an action.

† See *Hanenington* v. *Du Chattel*, 1 Bro. Ch. Cas. 124.

ASHHURST, J.:

It is a clear rule of law that no right of action can spring out of an illegal contract. This contract is illegal, as being against the principles of public policy, and therefore I agree with my Lord, that the plaintiffs cannot recover upon it.

GROSE, J.:

This is an attempt, by the executors of Captain Blachford, to recover a sum of money which (they say) is due to them, under a contract entered into by him in violation of another contract that he and the defendant made with the East India Company. Now it has been holden, that where puffers have been employed at an auction, it is a fraud upon the buyers; and no sale at such an auction can be enforced in a court of justice. So this contract is a fraud on the E. I. Company; it was entered into in defiance of the salutary regulations which were made by a great commercial company for the benefit of the public. It was also decided a few years ago in the Court of Common Pleas,† that no action could be maintained on an illegal contract, respecting the appointment to an office which is not saleable. And it seems to me that the principle on which that case was determined, also applies to and must govern the present case. Therefore, I am of opinion that the plaintiffs cannot recover on this agreement.

LAWRENCE, J.:

The case is shortly this: The late Captain Blachford paid the defendant 5,000*l.* to procure him the appointment to the command of a ship in the East India Company's service; in consideration of which the defendant promised to repay him, or his representatives, the same sum when any other person should be appointed to the command of that ship, or of any other ship built upon her bottom; and the title of the present plaintiffs is founded on that contract. After this agreement was entered into, the ship was lost, with Captain Blachford on board her; and Captain Lindsay was appointed to the *ship which [*94] was built upon her bottom, for which appointment Lindsay paid

† Vide *Garforth* v. *Fearon*, 1 H. Bl. Rep. 327, 2 R. R. 778.

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the defendant a large sum of money; subsequent to this the East India Company came to a resolution, for the purpose of abolishing the practice of selling the commands of ships, and of making compensation to some of the officers in their service who had paid for their commands; they allowed Captain Lindsay, among the rest, a certain sum of money; but no compensation was made to the representatives of Blachford: but this resolution was not made in approbation of the practice that had prevailed before; but, feeling that they were blameable for not having put a stop to it sooner, they came to a resolution of abolishing the practice that had obtained in defiance of the bye-laws of the Company. Then this action is founded on the contract of the defendant to repay to Blachford, or his representatives, the sum of 5,000*l.* on the appointment of a successor to Blachford, and not on the receipt of money by the defendant from Captain Lindsay; for the plaintiff's right of action against the defendant would have been equally good though he had received nothing from Lindsay. It is not a contract to pay such money as the defendant should receive from any other captain, but to repay a certain sum, at all events, on the appointment of another; and therefore the argument at the bar, that this action is bottomed on a contract that has been executed, is not well-founded. Then the short question here is, Whether or not a contract, entered into between two individuals in direct violation of the orders of the E. I. Company, and against public policy, can be enforced in a court of justice? With regard to offices under government, it has been decided that they cannot be sold, though they be not such offices as are mentioned in the statute 5 & 6 Edw. VI. This point was much considered in *Parsons* v. *Thompson*,* where an officer in the dock-yard at Chatham agreed to give another officer there a certain share of the profits, if the latter would procure himself to be superannuated, and retire on the usual pension, to make way for the former; and it was holden that such agreement, having been made without the knowledge of the Navy Board, to whom the appointment belonged, could not be the foundation of an action, because it was contrary to public policy. There a distinction was taken between those offices that

* 1 H. Bl. Rep. 322, 2 R. R. 773.

cannot be legally sold, and those that may be the object of sale, where the sale takes place under the authority and with the consent *of those who have the power of appointment, as commissions in the army. Now the principle on which that case and the cases there referred to was decided, must govern the present, unless it can be shewn that there is some distinction between offices held under the E. I. Company and those under Government: but I think no such distinction can be established as far as respects this purpose. But independently of that ground, a plaintiff cannot recover in a court of justice whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice, of third persons. Such is the case alluded to by my brother GROSE, of puffers at an auction; it is a fraud upon the buyers. So here this contract is a fraud on the E. I. Company, and cannot be the foundation of an action. On this ground, therefore, as well as because it is contrary to principles of public policy to allow of such contracts as the present, I am of opinion that the plaintiffs cannot maintain this action.

[*95]

Rule absolute.

MAYHEW *v.* PARKER AND OTHERS.

(8 T. R. 110—111.)

1799. *Jan.* 26.

A warrant to arrest the party "to the end that he may become bound, &c., to appear at the next sessions," &c., means the next sessions after the arrest, and not after the date of the warrant. Therefore the officer executing it may justify an arrest after the Sessions next ensuing the date of the warrant.

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IN trespass, for an assault and false imprisonment, the defendants gave, in evidence, a warrant under the hand and seal of Lord Kenyon, which, after reciting that it was certified, that at *the general Session of oyer and terminer at the Old Bailey, on the 11th of January, 37 Geo. III. the plaintiff was and stood indicted for perjury, to which indictment he had not appeared or pleaded, required and commanded the defendants (peace officers) to apprehend the plaintiff, and bring him before one of the Judges of the Court of K. B. &c. "to the end that he may become bound, with sufficient sureties, for his personal ap-

[*111]

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pearance at the next Sessions of oyer and terminer of our lord the King, to be holden for the city of London, to answer the said indictment, and be further dealt with according to law;" dated the 21st of January, 1797. It appeared that the arrest was not actually made until ten months afterwards. It was objected, at the trial before Lord Kenyon, at the last Sittings at Guildhall, that as the arrest was not made before the Old Bailey Sessions next ensuing the date of the warrant, the warrant was no longer in force, and could not justify an arrest and imprisonment afterwards: but Lord KENYON being of a different opinion, nonsuited the plaintiff.

Garrow now renewed the same objection, on a motion to set aside the nonsuit; and said, that the usual practice in these cases was to renew these warrants at every sessions, if not executed before; and that great inconvenience would ensue if it were otherwise, as warrants of arrest might be kept to answer particular purposes, and not executed till long after they were granted. But

LORD KENYON, Ch. J. said:

That the fair construction of such a warrant was, that the party to be arrested should be made to appear at the next sessions after the arrest: and that the only purpose which the practice alluded to could answer, was that of enhancing the expense to prosecutors, and putting money into the pockets of the officers. That, if any person misconducted himself by keeping back warrants of arrest, to be afterwards made use of for vexatious or improper purposes, he subjected himself to an action for a malicious prosecution, at the suit of the party grieved: but the warrant was a sufficient justification in trespass to the officer charged with the execution of it.

Per CURIAM:

Rule refused.

DOE *d.* DACRE *v.* DACRE.

(1 Bos. & P. 250—263.)*

1799.
Jan. 29.

[112]

LADY DACRE *v.* DOE, LESSEE OF GERTRUDE, BARONESS DACRE.

IN ERROR.

(8 T. R. 112—118.)

The words "in default of such sons" after estates tail given to sons in succession construed so as to make the subsequent gift a vested remainder.

THE Court of Common Pleas having given judgment in this ejectment, upon a special verdict for the original plaintiff, a writ of error was brought in this Court. The ejectment was for certain manors, messuages, and lands, in the county of Middlesex; and a special verdict was found in substance as follows: John Trevor, being seised in fee of the premises in question, by will duly executed, dated the 5th of April, 1743, devised his capital mansion-house of Glynde, in Sussex, and the demesne lands thereto belonging, and all his estates in Sussex, to his kinsman Dr. R. Trevor, in fee; to whom he also gave his leasehold property in the same county, and certain of his personalty in the house of Glynde; he then gave to his sister, Mrs. Rice, an annuity of 300*l.* for her life, payable out of his estates in Middlesex, Denbigh, and Flint. He also charged the same estates with another annuity of 50*l.* during the life of E. Forster. He also gave 1,000*l.* apiece to his nephew George, and his niece Lucy, the children of his sister Mrs. Rice, charged on the same estates, in default of his personal estate. He then devised as follows: "Item, I give, devise, and bequeath all my manors, lands, &c. in Middlesex, Denbigh and Flint, or elsewhere, not before disposed of, subject to the charges before mentioned, unto and amongst my sisters Grace Trevor, Mary Trevor, Ann, the wife of G. Boscawen, Margaret, Ruth, Gertrude, and Arabella Trevor, during their natural lives respectively, share and share

* The case in the Common Pleas is reported in 1 Bos. & P. 250—263, but it seems unnecessary to reproduce that report here. The report which follows is that of the Court in Error reproduced from Durnford and East.—R. C.

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alike; and from and after the decease of any of them, then the part or share of her or them so dying to go to the first and other sons of such of them so dying, and the heirs of his and their bodies successively in tail; and in default of such sons, then to and amongst the daughters of my said sisters so dying, as tenants in common, and not as joint-tenants, and to the heirs of their respective bodies issuing: but in case any of my said seven sisters last mentioned shall die without leaving any issue of her body begotten, or that such issue shall die before he or she shall attain his or her age of twenty-one years, *and without [*113] issue, then I give her share to and amongst the survivors or survivor of my said seven sisters and their issue, to go and descend in like manner as before is mentioned as to the shares, parts, or proportions before given to them respectively." He then bequeathed the overplus of his personal estate, subject to his debts and legacies, to his said seven sisters, and appointed his two sisters Ann and Margaret executrixes. The will then proceeds thus: "In case all my said seven sisters shall happen to die without issue, or leaving issue, such issue shall all die before he, she, or they shall attain the age of twenty-one years and without issue, then my said estate in Middlesex and Wales, subject as aforesaid, shall go to and be enjoyed by such person or persons who shall then be entitled to my said estate in Sussex hereinbefore devised, according to this my will; and in such case I do hereby devise the same to such person or persons accordingly."—The devisor died on the 9th September, 1743, leaving Lucy Rice and his seven other sisters his co-heiresses, him surviving. On his death those seven sisters, his devisees, entered and were seised as tenants in common. One of them, viz. Gertrude, on the 27th of July, 1744, married the Hon. Charles Roper, by whom she had issue Trevor Charles Roper, (afterwards Lord Dacre) and H. Roper who died, and Gertrude now Baroness Dacre (the lessor of the defendant in error). On the 4th of February, 1754, Charles Roper died, leaving his widow Gertrude sole seised of her undivided seventh part of the premises in question. In 1764, Ruth Trevor one of the seven sisters died without having been married, as did also Margaret, another of them in 1770. On the 2nd of March, 1773, Trevor

Charles Roper (the son of Gertrude) married the plaintiff in error; previous to and in contemplation of which marriage a recovery † was suffered of the one undivided fifth part of the premises of which his mother Gertrude was seised for life with remainder to him (her eldest son) in tail; and the same was settled to the use of Gertrude for life, remainder to Trevor Charles Roper for life, remainder to trustees, &c. remainder to the first and other sons of the marriage in tail male, remainder to the daughters as tenants in common in tail general, with cross remainders, &c.; remainder to the use of the said Trevor Charles Roper in fee. On 3rd of May, 1775, George Boscawen died, whereby his wife *Ann became sole seised for life of her [*114] undivided fifth part of the premises. On the 21st of March, 1780, Mary Trevor died unmarried: whereby her fifth became divided between her four surviving sisters Grace Trevor, Ann Boscawen, Gertrude Roper, and Arabella Trevor. On the 13th of July, 1780, Gertrude Roper died, whereby her one-fifth of the whole, of which a recovery had been suffered on her son's marriage, and her one-fourth of her sister Mary's one-fifth, descended to Trevor Charles Roper, her eldest son. On the 2nd of April, 1784, Ann Boscawen died, leaving George, her eldest son and heir at law, to whom descended her undivided fifth-part of the whole, and her one-fourth of her sister Mary's one-fifth. On the 13th of January, 1786, Trevor Charles Roper became Lord Dacre; and on the 21st of December, 1788, his younger brother Henry Roper died without issue. On the 21st of September, 1789, Arabella Trevor died unmarried, whereby her one-fifth of the whole, and her undivided fourth of her sister Mary's fifth-part, became divided in thirds amongst Grace Trevor, Trevor Charles Lord Dacre, and George Boscawen. On the 25th of August, 1790, Trevor Charles Lord Dacre made his will duly executed to pass real estates, whereby he devised to his wife, the plaintiff in error, all his property, both personal and real, for ever; and he died on the 3rd of July, 1794, without issue. At the time of his death, he, the said Trevor Charles

† The recovery was not set forth at length in this special verdict; it was stated according to its legal effect. See *Doe* v. *Halcombe*, 7 T. R. 716.

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Lord Dacre, the said George Boscawen Lord Dynavor (grandson and heir of Lucy Rice) and Grace Trevor, were the heirs at law of John Trevor, the devisor first mentioned. On Lord Dacre's death, the plaintiff in error, his widow and devisee, entered not only into his one undivided fifth, of which a recovery had been suffered (and to which she was certainly entitled) but also into the undivided fourth of his aunt Mary's fifth by him held, and into the undivided third of his aunt Arabella's fifth, and also into the third of her undivided fourth of her sister Mary's fifth, by him also held as tenant in tail; for which three last undivided parts the present ejectment was brought by Lord Dacre's only sister the present lessor of the plaintiff.

This case was argued in Michaelmas Term last by *Wood*, for the plaintiff in error, and *R. Smith contrà;* and in this Term by
[*115] *Chambre* for the plaintiff in error, and *Gibbs contrà*. * * The plaintiff in error contended, that the devise over to the daughters, "and in default of such sons," &c. was only to take place in case there should be no sons born of any of the devisor's sisters, and was therefore contingent; and there having been a son born, the remainder to the daughter of Gertrude (the lessor of the plaintiff below) never took effect; and then the estate descended to the heirs at law of the devisor, from one of whom the plaintiff in error claims, it being clearly the intention of the devisor that the ultimate remainder to Dr. Trevor should not take effect so long as any of the children of his own sisters should be living. And the cases principally relied on were, *Keene* d. *Pinnock et Ux.* v. *Dickson*, B. R. M. 24 Geo. III. and *Denn* d. *Briddon et Ux.* v. *Page*, in the same Term; both of which are referred to in the Reports in C. B.*

On the other hand it was contended, that those words meant no more than on failure of sons, or of the estates before devised, to the sons and the heirs of their bodies; and that the intention of the devisor was, to give estates for lives to his seven sisters, remainder to their first and other sons in tail, remainder to the daughters as tenants in common in tail, with cross remainders to the sisters and their issue, in case any of the sisters died

* Vid. 1 Bos. & P. 250.

without issue, or such issue died before twenty-one. And in support of this construction, the counsel relied much on the ultimate remainder to Dr. Trevor being given over upon the event of all the seven sisters dying without issue (*i.e.* male or female) or such issue dying before twenty one, and without issue.

LORD KENYON, Ch. J.:

The question is, Whether the mere birth of a son of one of the sisters put an end to all the subsequent limitations of that portion? and in order to determine this, it becomes necessary to consider the whole of the will, and particularly the last clause in it, which is this: "In case all my said seven sisters shall happen to die without issue, or leaving issue, such issue shall all die before he, she, or they shall attain the age of twenty-one years and without issue, then my said estate in Middlesex and Wales, subject as aforesaid, shall go to and be enjoyed by such person or persons who shall then be entitled to my said estate in Sussex, hereinbefore devised according to this my will." Here the intention of the devisor seems to be expressed in terms which cannot be misunderstood. If the seven sisters take an estate-tail, the whole of this clause *will have effect: but if they do not [*116] take an estate-tail, that part of the limitations which are defeated by the birth of a son, will not go to Doctor Trevor, but to the heirs at law of the devisor, one of whom the devisor intended should not take; and that shews the importance of the argument derived from the observation that there was an eighth sister, who was excluded by the limitations to the seven other sisters. This circumstance alone would be sufficient to decide this case. But, independently of this, I think that the former clause in the will would create an estate-tail in the sisters. In the construction of wills we cannot do better than adopt the rule mentioned by Lord HALE, *noscitur à sociis*. Now, here an estate-tail is given in the same clause to the sons of the sisters, and then, "in default of such sons," the limitations are to the daughters: but it is contended that there is a slip in the expression used in making this limitation, and that the devisor did not intend that the portion of either of the sisters should go to

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her daughter if she had a son born: but on weighing and considering every part of this clause, I have no doubt but that the devisor intended that the sisters should take estates-tail. But the case of *Denn* d. *Briddon* v. *Page*, has been relied on by the plaintiffs in error: where Lord MANSFIELD intimated an opinion that there was a blunder in the will. I find myself pressed by whatever fell from so great a judge, and it is always with doubt and distrust of my own mind that I differ from him in opinion: but I am not prepared to say that there was any blunder in that will. There the devisor gave to S. Nash the son of T. and M. Nash for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of S. Nash and the heirs male of his and their bodies; then having provided for the male heirs (who are in general the favourites in case of landed property) it is not improbable that it should occur to the testator to provide for the present generation, and therefore he devised to all and every the daughters of the body of T. Nash by his then wife; and for default of such issue to the right heirs of T. Nash for ever. Now, when there is nothing in the will to lead to such a supposition, why should it be supposed that there was a blunder that brought forward the daughters of sons in preference to the issue of the sisters; I have known many cautious testators make limitations in their wills like that. Here the word "sons" had been slipped in instead of "issue" in one place; but it is supplied in another. And on the whole, I have no doubt but that the judgment given in the Court of Common Pleas ought to be affirmed.

[117] ASHHURST, J.:

On reading the whole will it is evident, that by the words "and in default of such sons," the devisor meant "failing the limitation," then over. Therefore I concur in the opinion given by Lord KENYON.

GROSE, J.:

The question here is, Whether the words "in default of such sons," are not to be understood as meaning that "that limitation failing," the limitations to the daughters and their issue should

take effect? or, whether by the birth of a son the limitations to the daughters should be defeated? Every word in this will shews, I think, that the former was the intention of the devisor. He intended first that the sons should take estates-tail; and when that limitation failed, that the daughters should take in remainder. The limitation to the daughters shews that this was his intention; and if there were any doubt on the construction of that part of the will, the last devise removes all doubt, for there the devise over of the estates in Middlesex and Wales is only to take place "in case all his seven sisters should die without issue," &c. It is said, however, that though we may conjecture that this was the devisor's intention, the words of the will do not prove it; and the counsel for the plaintiff in error went into a minute comment on the particular penning of the will; but if we comment very minutely on the words in the will, I think I can read them so as to make the construction which we put on the whole consistent with every word. The words after the limitation to the sisters and their first and other sons, &c. are, "and in default of such sons, then to and amongst the daughters," &c.; but when is that to take place? at the time of the deaths of the sons. This mode of reading the words is consistent with the whole will: but in order to support the construction we put upon the will, I am not driven to this argument, because, considering the whole will together, and particularly the last clause of it, I am clearly of opinion that it was the devisor's intention that the limitation to the daughters should take effect when the limitation to the sons failed.

LAWRENCE, J.:

The limitation on which the argument for the plaintiff in error is built, is to the first and other sons, and the heirs of his or their bodies successively; and in default of such sons, then to and amongst the daughters, &c. that is, in default of a first and other sons; for those are the words immediately preceding. Now, that is equivalent to a limitation to the first, second, third, and fourth sons, &c. and the limitation over, "in default of such sons," is the same as if it had been in words "in default of a first, second, *third, and fourth sons," &c.; that is, "if there be [*118]

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but one son," I give to the daughters of my sisters on the failure of a second son; if there be two sons, and no third son, then on the failure of a third son, and so on. So that, according to this construction, whenever there is a failure or default of a second, third, or other son, who would be entitled to take on the death of a prior son without issue, the daughters of the sisters shall take. And this obviates the objection, that the construction contended for by the defendant in error will exclude the daughters of sons; for if there be a son who leaves a daughter, that daughter would take; and if she died without issue, and there were no second, third, or other son of the devisor's sister to take, then there would be a default of sons, and the limitation to the daughters of the devisor's sisters would take effect. So that if there were a first and second son, and the second should die, leaving daughters, and then the first son should die without issue, the daughters of the second son would take the remainder in tail, vested in their father; and if they were to die without issue, and there were no third son, then there would be a default of sons, and the remainder to the daughters of the sisters would take effect.

Judgment affirmed.

1799. *Jan.* 31.

HARTLEY *v.* HERRING.

(8 T. R. 130—133.)

[130]

In an action for consequential damage from slander, imputing incontinence to the plaintiff, it is enough to state that he was employed to preach to a dissenting congregation at a certain licensed chapel situated at A.; that he derived considerable profit from his preaching; and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and otherwise would have given," without saying who those persons were.*

IN an action upon the case, for consequential damage arising from certain slanderous words spoken by the defendant of the plaintiff, the declaration stated, That the plaintiff was until the speaking and publishing of the false, scandalous, and malicious words, &c. from time to time occasionally employed to preach to

* Followed in *Evans* v. *Harries* (1856) 1 H. & N. 251, 26 L. J. Ex. 31.—R. C.

a certain congregation of persons dissenting from the Church of England, at a certain chapel situate and being in the parish of Saint Mary Lambeth, in the county of Surrey, for that purpose regularly and in due form of law licensed; and had by reason of such good character, and for such preaching, received divers great gains, profits, and emoluments, to his great benefit and advantage, and to the comfortable support of himself and his family, to wit, at, &c.; nevertheless *the defendant, well knowing the premises, but maliciously contriving and intending to deprive him thereof, and to bring him into disrepute and detestation among his neighbours, and amongst the persons frequenting the said chapel; and to induce the said persons to prevent his preaching there, or receiving any profit, gain, or emolument thereby, on, &c. at &c. scandalously, &c. spoke the following words, &c. (setting out the scandalous words, which charged the plaintiff with incontinence); *per quod* the plaintiff was injured in his good name, &c.; and was fallen into disgrace among his neighbours, and with the persons frequenting the said chapel as aforesaid, insomuch, that the said persons frequenting the said chapel, by reason of the speaking, &c. have wholly refused to permit him to preach at the said chapel, and have withdrawn from him their countenance and support; and have discontinued giving him the gains, and profits, and emoluments which they had usually given, and would otherwise have given; and that the plaintiff was, in other respects, greatly damnified and hindered from getting his livelihood, to wit, at, &c.

[*131]

Best moved in arrest of judgment in the last Term:

Because words charging a person with incontinence, are not actionable in the common law courts, unless special damage be laid; and here none is precisely laid, it not being stated who were the persons who, in consequence of the slander, discontinued giving the plaintiff the emoluments he had before received, or that there was any certain stipend annexed to the chapel, or that the persons who frequented had a right to remove him from it, or that he was a preacher, duly qualified according to the 10 Ann. c. 2; and he cited 1 Roll. Abr. 58, C. 35; *Barnes* v. *Prudlin*, 1 Sid. 396, 7; and *Hunt* v. *Jones*, Cro. Jac. 499.

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Marryatt now shewed cause:

The declaration alleges the special damage with as much certainty as the subject-matter is capable of. It states, That the plaintiff, before the speaking of the scandalous words, was employed to preach to a dissenting congregation at a certain licensed chapel (the locality of which is stated); and that he derived considerable profit from his good character and preaching; and that by reason of the scandal of the defendant, the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and would otherwise have given. It was impossible to state who the congregation were by name; because, [*132] being a large, fluctuating and *uncertain body, they cannot be known to the plaintiff himself. The stating therefore where the chapel was, and the nature of the emolument which the plaintiff derived from his preaching, is stating as much as is necessary to enable the defendant to come prepared to meet the charge; and on this ground the cases cited are distinguishable from the present. 1 Roll. Abr. 58, was the case of slandering a brewer in his trade, by which he lost his customers, without stating any of of them by name, which was holden ill; but there the plaintiff must have known who his customers were whom he had lost; and the defendant could not be enabled to defend himself without such notice. The case of *Barnes* v. *Prudlin*† was an action for slandering a single woman, by saying she was with child, and had miscarried; in consequence of which she lost several suitors, &c.: there also the suitors were necessarily within the plaintiff's knowledge; and the defendant without the like notice could not defend himself against the charge. The same answer applies to the case of *Hunt* v. *Jones*;‡ where the plaintiff complained that having used the trade of baker, whereby she maintained herself, and being desired in marriage by many honest men, she, by reason of the defendant's calling her whore, &c. lost her marriage; and divers forebore to buy bread of her: on which judgment was arrested.

† 1 Sid. 396; 1 Ventr. 4, S. C. ‡ Cro. Jac. 499.

Best, in support of rule:

The special damage is the gist of the action, where the words themselves, as here, are not actionable; and therefore they must be laid with precision, and proved as laid. Bull. Ni. Pri. 6, 7. No action lies for prevailing on another to withhold a voluntary donation; which is the utmost that is alleged in this case. It is not even stated that the plaintiff was a preacher, only that he occasionally preached, much less that he was duly qualified, as required by the 10 Ann. c. 2. In *Hunt* v. *Jones*, before cited, where the plaintiff merely stated that she used the trade of a baker, it was holden not equivalent to an allegation that she was a common baker. At any rate, upon the authority of the cases mentioned, the plaintiff ought to have set forth by name the persons who had, in consequence of the slander, ceased to give him their donations, it not being alleged that this was a known office, having a certain salary annexed to it. At least, it should have been averred, that the persons frequenting the chapel had a right to exclude the plaintiff from preaching there, otherwise *non constat*, that he was legally and properly removed.

LORD KENYON, Ch. J.: [133]

I see no objection to this declaration; but in deciding the present case, I wish not to shake the authority of any of the cases relied upon by the defendant, which are distinguishable from the present, for the reasons given at the bar. Where a plaintiff brings an action for slander, by which he lost his customers in trade, he ought, in his declaration, to state the names of those customers, in order that the defendant may be enabled to meet the charge if it be false: but here the plaintiff was in possession of this office; and we are to conclude upon this record, that he was properly licensed. But how could he have stated the names of all his congregation? He has stated, That in consequence of the words spoken of by the defendant, he was removed from his office, and lost the emoluments of it; which, I think, is sufficient.

The three other Judges expressing the same opinion, the

Rule was discharged.

1799.
Feb. 5.

ECKHARDT AND OTHERS *v.* WILSON.

(8 T. R. 140—142.)

[140]

To *assumpsit* by several partners, the defendant may plead in bar the bankruptcy of one of them.† If partners by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void.

THIS was an action upon promises; to which the defendant pleaded, in bar, the bankruptcy of A. G. Eckhardt, one of the plaintiffs, and an assignment under it, of all his debts and effects, for the benefit of his creditors. The plaintiffs replied, that, before the bankruptcy of the said A. G. Eckhardt, he, with the other plaintiffs, who were partners in trade, by a deed of assignment, dated the 11th of March, 1796, after reciting that they were indebted, and were unable to discharge their debts and carry on their trade, assigned to certain trustees all their stock in trade, debts, and effects, for the benefit of all their creditors who should execute the said deed, with a power of attorney to the trustees to sue for and recover debts, &c.; averring that the names of the plaintiffs were only used for and in behalf of the trustees, and to enable them to receive the debt due from the defendant to them, under the said deed of assignment. To this the defendant rejoined, that the bankrupt, at the time of executing the said deed of assignment, and his bankruptcy, was indebted to several persons who did not execute that deed, that their debts are unpaid, and that they have sought relief under the commission of bankrupt issued against A. G. Eckhardt; wherefore the deed of assignment mentioned in the replication is void as to A. G. Eckhardt's share in the partner-

[*141] *ship debts and effects, and the deed of assignment made under the commission of bankrupt, is in full force, &c. The plaintiffs demurred generally to this rejoinder.

Lawes in support of the demurrer:

First, the plea itself cannot be supported. The reasoning in the cases of *Fowler* v. *Dunn*‡ and *Webb* v. *Fox*,§ where it was holden

† Dicey on Parties, Rule 23, 2. ‡ 1 Bos. & P. 44.
§ *Ante*, p. 472; 7 T. R. 391.

that an uncertificated bankrupt might maintain trover for goods acquired by him after his bankruptcy, applies to the present case, and shews that this action may be supported by the four partners, notwithstanding the bankruptcy of one of them (his assignees not interfering). The same doctrine was also applied to two *nisi prius* cases, cited in *Webb* v. *Fox*, by the names of *Evans* v. *Brown*,† and *Silk* v. *Osborne*,‡ which were actions of *assumpsit*. And they proceeded on this principle, that the defendant is estopped by his contract with the bankrupt, to dispute the right of the latter to sue. There is also another objection to the plea, that even if the defendant can be permitted to avail himself of the subject-matter of the plea, it should have been a plea in abatement, not in bar. Secondly, At all events the rejoinder gives no answer to the replication. It was ruled in *Winch* v. *Keeley*,§ that the assignor of a chose in action, who is become a bankrupt, may sue the debtor for the benefit of the assignee. And if it be argued that the assignment is fraudulent, because the bankrupt partner (A. G. Eckhardt) had separate creditors who would not be entitled to come in under the assignment which was made for the benefit of the joint creditors, it may be answered that the assignment being of the partnership effects, the separate creditors of the bankrupt would not be entitled to any share of the joint stock, and therefore as against those creditors the deed is not fraudulent, and none of the joint creditors appear to have dissented from it.

Walton, *contrà*, after mentioning the case of *Marlar* v. *Kenworthy*, H. 24 Geo. III. B. R. where it was decided that such a plea as the present was properly pleaded in bar, was stopped by

The COURT, who said there was nothing in either of the objections. That the cases of *Webb* v. *Fox*, and *Fowler* v. *Dunn*, proceeded on this ground: That an uncertificated bankrupt had a special property in the goods in his possession subsequent to his bankruptcy, in respect of which he might maintain an action of *trover; but that they could not govern the decision in the [*142]

† Espin. N. P. 170, reported in 5 R. R. ‡ Espin. N. P. 140.

§ 1 T. R. 619.

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present case, which was an action on a contract; and that the bankrupt's right of suing to enforce that contract was vested in his assignees. That the plea was properly pleaded in bar, because it shewed not merely that there were other persons (namely, the assignees of the bankrupt partner) who ought to have sued with the plaintiffs, but that one of the plaintiffs could not sue at all. That the rejoinder also was good; for that an assignment by deed, by traders, of all their effects, unless all their creditors concurred, was not only fraudulent and void as against those creditors who did not concur, but was an act of bankruptcy. That whether the creditors who did not concur were joint or separate creditors was immaterial; for that the funds of the partners (bankrupts) were liable to all their creditors, first to the joint creditors, and afterwards the aliquot parts to the separate creditors of each.

Per CURIAM:

Judgment for the defendant.

BOEHM AND OTHERS *v.* BELL.

(8 T. R. 154—162.)

1799. *Feb.* 8.

[154]

Captors of ship seized as prize may insure their interest therein, and are not entitled to a return of premium, although it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the Court of Admiralty.

THIS was an action for money had and received, brought by the plaintiffs, as agents and insurance-brokers of the Hon. W. Elphinstone and J. Jackson, who are the agents in England of C. Brisbane, late commander of his Majesty's frigate *L'Oiseau*; W. Durban, late commander of his Majesty's frigate the *Saldanha*; and D. O. Guion, late commander of his Majesty's ship *Vindictive*, to recover 94*l.* 19*s.* 2*d.* being part of the premium of 105*l.* paid to the defendant as an underwriter for 500*l.* upon the policy insurance hereinafter stated. The defendant pleaded the general issue. At the trial of this cause, before Lord Kenyon at the Sittings at Guildhall after last

Michaelmas Term, the jury found a verdict for the plaintiffs for 94*l.* 19*s.* 2*d.* subject to the opinion of this Court on the following case:—

On the 30th of January, 1797, the above-mentioned captains, Brisbane, Durban, and Guion, having taken the ship *Westcapelle* and her cargo as prize, off the Cape of Good Hope, then bound upon a voyage from Batavia to Boston, put her under the command of Lieutenant Macdougal of the *L'Oiseau*, as prize-master; and sent a letter to Messrs. Elphinstone & Jackson mentioning the capture of the *Westcapelle*, formerly a Dutch East India ship, but then navigated under American colours from Batavia, by the name of the *George* of Boston, manned with a crew above two-thirds Dutch, which they supposed a lawful prize; and stating, that as there was no Court of Admiralty there, they were under the necessity of sending her to England for trial and advising an insurance on the ship and cargo of 40,000*l.* from all risk during her passage to England. By the same letter it appeared, that the estimated value of the prize was 150,000*l.* Messrs. Elphinstone & Jackson in consequence of such orders, directed the plaintiffs to cause the said *ship and cargo to be [*155] insured to the extent of 40,000*l.*; and accordingly the plaintiffs, on the 22nd of April, 1797, effected a policy upon the ship and goods "at and from the Cape of Good Hope to London, valued at 150,000*l.* being on ship and cargo. This insurance being effected by order and for account of the Hon. W. Elphinstone & J. Jackson, Esq. agents for the captors, at a premium of 20 guineas per cent. to return 8*l.* per cent. if departs from the Cape or St. Helena with convoy for England, and arrives." The defendant subscribed the policy for 500*l.* and received the premium, being 105*l.* The plaintiffs and Messrs. Elphinstone & Jackson effected other policies on the same ship and cargo for the homeward risk to the extent in the whole of 48,000*l.* at the same premium; and after the ship's arrival in the Thames, they effected other policies with the public insurance offices against river risks: one at the rate of 10*s.* per cent. another at 15*s.* and two others at 1*l.* per cent. premium. The ship, after her capture sailed with her cargo under the command of Lieutenant Macdougal, as prize-master, from the Cape of Good Hope with

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convoy for St. Helena, where she arrived and remained in safety for one month. She sailed from thence for England without convoy, and arrived in safety in the Thames on the 7th of August, 1797. The ship and cargo were, at the instance of the captors, libelled as prize in the usual manner in the Court of Admiralty, as belonging to subjects of Holland, enemies of the King of Great Britain; but on the 30th of August, 1797, a claim was there made and entered by W. Burgess, on behalf of Theodore Layman, George Williams & Company, and Samuel Gardner, all of Boston, in the State of Massachusetts, and Clifford Crowninshielt, the master, and Henry Smith, and Messrs. Brown & Francis, of Providence County, in the State of Rhode Island and Providence Plantation, merchants, and respectively citizens of America, as the true and lawful owners and proprietors of the ship *Westcapelle* and cargo; also on behalf of the officers and crew of the ship, and of Jonathan Dennison for his private adventure; and on the 17th of March, 1798, the following sentence was pronounced thereupon: "The Judge having heard further informations, and advocates and proctors on both sides thereon, at the petition of Slade, admitted the claim for the ship and cargo (except such part thereof as is claimed as the property of Huibright Maarhys, the chief mate); and by interlocutory decree, pronounced the said ship and cargo (except as aforesaid) to have belonged as claimed, and decreed the same to be restored *to the claimant, for the use of the owners and proprietors thereof; and by further interlocutory decree, pronounced the goods claimed on behalf of H. Maarhys to have belonged at the time of the capture and seizure thereof, to an enemy of the crown of Great Britain, and as such or otherwise, subject and liable to confiscation; and condemned the same as good and lawful prize, taken by his Majesty's ship of war *L'Oiseau*, C. Brisbane, commander, in company with his Majesty's ship of war *Vindictive*, D. O. Guion, commander, and *Saldanha*, W. Durban, commander; and rejected Slade's prayer, as to reserving the consideration of damages subsequent to the capture." The ship and cargo have been since restored to the claimants, and have been sold by them; the former producing about 1,500*l.* and the latter about

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60,000*l*. The goods of H. Maarhys condemned by the sentence, have been since also sold by the proper officer of the Court of Admiralty; and, after deducting the expenses of sale, have produced the sum of 1,014*l*. the invoice price thereof being about 300*l*. No fraud is imputable either to the plaintiffs or to the captors of the ship and cargo, respecting the insurance in question. On the 1st of November, 1798, the plaintiffs demanded from the defendant and other underwriters 18*l*. 19*s*. 10*d*. per cent. as a return of the proportion of the premium paid by the plaintiffs to the defendant upon the policy, in respect of the ship and such part of the cargo as has been decreed to be restored by the above sentence; and for this demand the present action is brought.

Park for the plaintiffs:

The assured are entitled to a proportionable return of premium, on the ground that the consideration on which it was paid to the underwriter has failed; the insurance having been made on the supposition that the property insured was lawful prize and the property of the captors, which turns out in the event to be without foundation, except as to about a fortieth part. In *Tyre* v. *Fletcher*,† Lord MANSFIELD said, "A policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured; and to whatever cause it be owing, if he do not run the risk, the consideration for which the premium was paid fails, and therefore he ought to return it." This rule applies in every day's practice in policies with short interest, as where twenty hogsheads of sugar are insured, and only ten are shipped: in which case there is always a proportionable return of premium; or if none be shipped, the whole is returned: so here the Court of Admiralty [*157] having in effect determined that the captors had no property on board (with the trifling exception above noticed) the underwriters run no risk but in that respect, and therefore cannot in conscience hold the entire premium. It is true that captors, and even agents of prize, have been holden‡ to have such an

† Cowp. 668.

‡ *Le Cras* v. *Hughes*, B. R. E. 22 Geo. III.; Park's Insur. 307.

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expectation of interest therein as that they may insure it; but that is founded upon the supposition that the subject-matter is lawful prize, though till condemnation, the property is not vested in them. Here too the subject-matter was Dutch prize; and the stat. 37 Geo. III. c. 109, s. 1; only vests the property of Dutch prize in the captors after condemnation; so that in the event it appears that they never could have recovered upon this policy. No deception was practised on the underwriter; and he himself knew that, unless the ship and cargo were lawful prize, no property could vest in the captors. If the ship had been lost in the voyage by any peril insured against, the underwriter would not have been liable to the whole extent of the policy; but might have shewn that it was no prize, and so the captors not interested. For though the proceedings of the Court of Admiralty are, generally speaking, *in rem*, yet it being necessary for the ends of justice, they would have entertained jurisdiction upon the question of prize or no prize. Besides the captors might have libelled in that Court for their head-money; in which case that question would necessarily have come in judgment. The owners also might have sued in that Court for a restitution in costs and damages for any loss which their property had been subjected to, by the unwarranted seizure of the captors. If, however, it be urged that that itself was a risk against which the captors had a right to indemnify themselves, the answer is, That the unlawful act of the captors themselves was not one of the risks insured; besides, the Admiralty Court having rejected the prayer of the owners for reserving the consideration of damages subsequent to the capture, have in effect adjudged, that there was reasonable ground for the detention of the ship by the captors, and consequently they run no risk on that account, as appears by the judgment of that Court. Indeed, by the course of proceeding there, costs and damages are never awarded against the captors after a sentence of restitution, unless they appear to have been guilty of some misconduct or gross negligence in making the capture, or in their subsequent conduct of the prize. Then it will be urged that, this being a *valued policy, and some part being adjudged prize, namely, to the extent of 1,014*l.* out of 40,000*l.* insured, to which

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extent at least a risk was incurred by the underwriters, there can be no apportionment of the premium. But this proceeds on mistaking the nature of valued policies. They do not import that the parties are to be bound to the extent of the sum insured at all events, whether he have any interest in the subject-matter or not, but only that the assured shall not be obliged to prove minutely the value of his property: still however it must bear some proportion to the sum insured. This doctrine was fully recognized by Lord MANSFIELD in *Lewis* v. *Rucker*,* who concludes with saying, "It is settled that upon valued policies the merchant need only prove some interest to take it out of the 19 G. II. c. 37; because the adverse party has admitted the value; and if more were required, the agreed valuation would signify nothing. But if it should come out in proof that a man had insured 2,000*l.* and had interest on board to the value of a cable only, there never has been, and I believe never will be, a determination, that, by such an evasion, the Act of Parliament may be defeated." Lord KENYON inclined to the same opinion in *Flint* v. *Le Mesurier* at Guildhall;† where the quantum of the interest of the assured was finally agreed to be referred. The only cases of this kind, where underwriters have been suffered to retain the whole premium, have been when the insurance was fraudulently made beyond the value of the interest, in order to cheat them. But here fraud is negatived; and the parties acted altogether under a mistake. This being a new case, if there be any doubt, it ought to be decided in favour of the assured, on the ruling principle of insurance law, that such policies are mere contracts of indemnity up to the extent of the risk really incurred.

Giles, contrà:

The assured are not entitled to a return of any part of the premium, because the policy did attach, the risk was incurred, and consequently, the consideration of the premium has not failed. The defendant is entitled to retain it on three grounds: 1st, The assured had an insurable interest to the amount of the sum insured, and in the event of a loss might have recovered against the underwriter. There is a fallacy in the plaintiff's

* 2 Burr. 1167. † Vid. Park's Insur. 3rd edit.

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argument, that, because the ship was not ultimately condemned as prize, the captors had nothing to insure; which fallacy arises from not distinguishing between an insurable interest and an
[*159] absolute indefeasible property. But it is clear, *the one may exist without the other, as was holden in *Le Cras* v. *Hughes*, and *Flint* v. *Le Mesurier*. Here the assured had the possession of the thing insured, together with a contingent interest in the event of its being condemned. They had also an immediate interest in the subject-matter, arising out of their responsibility for the care and safety of the ship; it being admitted that in case of gross negligence or misconduct, the Admiralty Court would adjudge a compensation to the owners in costs and damages. *Le Caux* v. *Eden*, Dougl. 594. Now, if in any event the underwriters might have been answerable, it follows that there can be no return of premium. The expectation of an interest, in this case, was no more uncertain than the profits of a consignee of goods,† or of an agent of prize, who may insure their expected profits: and yet, in the one case, the consignor may stop the goods *in transitu;* and in the other, it may turn out to be no lawful prize. At any rate the captors might insure, considered as trustees for the owners, in the event of the property not being condemned as prize, according to what was said by Mr. J. GROSE, in *Craufurd* v. *Hunter*.‡ But, 2dly, The extent of the interest of the assured is immaterial in this case, because this is a valued policy, wherein the parties have agreed on the amount of the interest insured. This having been done *bonâ fide*, is conclusive between them. The very intention of such a policy is to prevent all dispute about the value; it is a part of the contract itself: and nothing can impeach it but fraud, which is here negatived. In *Thellusson* v. *Fletcher*,§ it was holden that, on a writ of inquiry in an action on a valued policy, no other proof of interest was necessary than the policy itself. It is admitted that it would conclude any question of difference to a small extent of value;—then where can the line be drawn? If this action can be maintained, it will encourage frauds; for the assured will always insure beyond the true value,

† Vid. *Grant* v. *Parkinson*, B. R. M. 22 Geo. III. Park's Insur. 305.

‡ *Ante*, p. 579.

§ Dougl. 314.

in order to take the chance of recovering more in case of a loss, while on the other hand, if the ship arrives safe, they who alone know the real value, may recover back a proportionable part of the premium beyond what was really risked. In *Montgomery* v. *Eggington*,† the assured on a valued policy on freight, was holden entitled to recover the whole amount, though only part of the goods were on board at the time of the loss; which establishes the distinction between open and valued *policies: [*160] and this is recognized by the Legislature in the 35 Geo. III. c. 63, s. 10, imposing stamps on sea-insurances, where there is a proviso that, in case the sums insured on homeward-bound voyages exceed the interest of the assured to a certain amount, the commissioners shall make an allowance of the stamp duties on the excess, with an exception in case of valued policies. 3rdly, At any rate, as this was an insurance on a foreign ship it was not neccessary that the assured should have any interest at all, it not being within the stat. 19 Geo. II. c. 37; as was holden in *Craufurd* v. *Hunter*.‡ Therefore, on either of these grounds the plaintiff is not entitled to a return of premium.

Park, in reply said:

That in all cases, whether of valued or open policies, the assured must prove an interest; and in the former the policy is but *primâ facie* evidence of the extent of it. That the case of *Montgomery* v. *Eggington* proceeded on the ground that, the insurance on the freight being entire, the ship-owner had a right to insure the whole of his expected gain as soon as the ship had begun to earn her freight; and that the case of *Craufurd* v. *Hunter* did not apply, that being an express insurance on Dutch property on board Dutch ships: whereas this was insured as English property, become such by capture; and therefore it was necessary by the stat. 19 Geo. II. c. 37, to prove an interest in the assured.

LORD KENYON, Ch. J.:

Although this is a case of great value, and new in specie, I am inclined to give my opinion on it now, it being a case of

† 3 T. R. 362; 1 R. R. 718. ‡ *Ante*, p. 576.

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considerable expectation and of little difficulty. At the trial of this cause I adopted an opinion unfavourable to the plaintiff's claim: before I left the Court, indeed, I began to doubt whether I had not formed my opinion too hastily; I therefore postponed coming to any conclusion until I had heard the case argued: but now, having had great assistance from the counsel on both sides, and having considered the case more attentively than almost any other that ever came before me, I confess that the first impressions which the case made upon my mind have not been removed. I will not enter into a discussion of either of the two last points made by the defendant's counsel, because the first alone furnishes, in my opinion, an answer to this action; and I am the more strongly fortified in that opinion, by considering what has not been as well as what has been urged by the counsel in reply; for it is observable that the plaintiff's *counsel did not [*161] even attempt to give any answer to the first point made by the defendant, as if conscious that it was unanswerable. The real question in this case is one of the most simple that can be stated; it is merely this, Whether the assured had or had not any interest? This ship was captured by the captains of the ships mentioned in the case, who were acting in the service of their country, and on whose conduct there is not the smallest imputation; they had the possession of the property insured, and from that possession, certain rights and duties resulted. If it were a legal capture, the captors were entitled; if the capture were improperly made, they were liable to be called to an account in the Court of Admiralty, where they might be amerced in damages and costs. They had therefore a right to insure themselves, against the decision that might have loaded them with damages and costs. It was important to them to take care that there should be something forthcoming to answer for the amount of those damages. On this short ground therefore, I am clearly of opinion, that the assured had an insurable interest that the risk was begun, and that there can be no return of premium.

GROSE, J.:

This is a claim by the plaintiffs for a return of premium, on the ground that the assured had no insurable interest in the

property. But it would be opening a source of infinite litigation, if we were to decide that this action could be maintained, and that a portion of the premium ought to be returned, in the event of its appearing that the assured had not an interest up to the extent of the insurance. Three answers have been given to this case by the defendant's counsel: of the two last I shall only say that they are important, and will deserve much consideration when it becomes necessary to decide on them; but here it is not necessary to give an opinion upon either of them. With regard to the first, it seems to me that the whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest: and according to what was said by Lord MANSFIELD in the case of *Le Cras* v. *Hughes*, they certainly had an insurable interest. If they had succeeded in the Court of Admiralty, it will be admitted that they had an insurable interest: and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to them to insure. I am therefore satisfied that they had an insurable *interest in the subject [*162] insured; and this is a full answer to the present action.

LAWRENCE, J.:

The case turns on this short question, Whether or not the assured had an interest which they might insure? Did they mean to game? or was not there a loss against which they might indemnify themselves, by a policy of insurance? I do not mean a certain, but a possible loss. Now, it has been shewn that this was a case in which the Court of Admiralty might have decreed them to pay damages and costs; and that is sufficient. It might be asked, in the language of Lord MANSFIELD, in *Le Cras* v. *Hughes*, "Had not the insured such an interest in the ship coming home, as to entitle them to an indemnity?" I think that they had; and therefore that the plaintiffs are not entitled to a return of premium.

Postea to the defendant.

K. B. EASTER TERM.

1799. *April* 15.

OGLE AND ANOTHER *v.* BARNES AND OTHERS.

(8 T. R. 188—192.)

[188]

If A. wilfully run his vessel against B.'s, and damage ensue, B. may bring trespass: but if A. so negligently steer his vessel that it runs foul of B.'s, then case is the proper action.†

THIS was an action upon the case. The declaration stated, that the plaintiffs were possessed of a ship called the *Anne*, which was sailing on a certain voyage, &c. and that the defendants were possessed of another ship called the *Acteon*, also sailing, &c. of which they had the care, direction, and management; but that they so incautiously, carelessly, negligently, and inexpertly managed, steered, and directed their ship, and took such bad care of the management, steering, and direction thereof, that the said ship of the defendants, through the mere default, and by reason of the negligence, carelessness, ignorance, and unskilfulness of the defendants, with great violence and force, sailed against and ran foul of, and came upon and against the ship of the plaintiffs, and struck against the said ship of the plaintiffs with great force, so that the plaintiffs' ship was greatly
[*189] damaged, &c. The second count in the *declaration only varied from the first in stating, that the defendants' ship was under the care and direction of Barnes, one of the defendants, and of certain servants of the defendants, &c.

The plaintiffs having obtained a verdict, the defendants moved in arrest of judgment, on the ground that the present action was misconceived, for that the plaintiffs ought to have brought trespass, and not an action on the case.

[After argument:]

[190] LORD KENYON, Ch. J.:

It is not necessary to have recourse to the Year Books for cases or principles on which to decide the case before us.

† See *Moreton* v. *Hardern* (1825) 4 B. & C. 223, 227, and note at the end of the principal case.—R. C.

All the authorities on this subject agree in the principle which must govern the present case. It is clear that the mind need not concur in the act that occasions an injury to another: if the act occasion an immediate injury to another, trespass is the proper remedy; but if the injury be not immediate but only consequential upon the act done, there the party injured must bring an action on the case. This is clearly established in a *variety of cases, and particularly in those cited from 1 Strange,† [*191] and 2 Bl. Rep.‡ in the latter of which, though the Judges differed as to the conclusion to be drawn from the facts of the case, they all agreed in the principle. In *Day* v. *Edwards*,§ and *Savignac* v. *Roome*,‖ the defendants did an act which was immediately injurious to the plaintiffs: in the one case it was alleged that the defendant furiously, and in the other that he wilfully, drove his cart against the plaintiff's chaise. But it cannot be said, that in this case the defendants *vi et armis* did an injury to the plaintiffs, when it appears that they did not do any act at all. The charge imputed to these defendants is, that they so carelessly and negligently steered their vessel, that by reason of such negligence, their vessel sailed against and ran foul of the plaintiffs'; and for that negligence they are liable in an action upon the case.

GROSE, J.:

This is a motion in arrest of judgment, and therefore every presumption is to be made in favour of the verdict; at least nothing is to be presumed against it. Now the declaration does not charge the defendants with having done any act wilfully; it only alleges negligence, and it is like the case of *Morley* v. *Gaisford*,¶ where it was adjudged by the Court of Common Pleas that an action upon the case was the proper remedy.

If the plaintiffs had sustained the injury by the wilful act of the defendants, then this case must have been governed by that of *Tripe* and another v. *Potter*:†† there the plaintiffs brought an action upon the case against the defendant, for wilfully rowing his boat against their net, and Mr. J. YATES, before whom

† *Reynolds* v. *Clarke*, 1 Str. 634.
‡ *Scott* v. *Shepherd*, 2 Bl. Rep. 892; 3 Wils. 403.
§ 5 T. R. 648.
‖ 6 T. R. 125.
¶ 3 R. R. 432.
†† 6 T. R. 128.

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the cause was tried at Exeter Summer assizes 1767, was of opinion that the plaintiffs had misconceived their action; they submitted to a nonsuit, and afterwards brought trespass and succeeded: this clearly shews the distinction between the actions of trespass and case. On this record it is stated that the injury, of which the plaintiffs complain, was occasioned by the negligence of the defendants: if on the trial it had been proved that it was occasioned by their wilful act, the plaintiffs would have been nonsuited; but the jury having found a verdict for the plaintiffs, we must consider that the complaint set forth in the declaration was proved: and for such an injury an action upon the case is the proper remedy.

LAWRENCE, J.:

There is a great deal of good sense in what is stated in the [*192] case † cited from 2 Burr. 1114. Such an injury *as the present may be occasioned, either by the wilful act or by the negligence of the defendants: it is a question of evidence. If the former, trespass is the proper action; if the latter, an action on the case. If it had appeared in evidence in this case, that the defendants had wilfully done the act, the plaintiffs must have been nonsuited. The negligent and improvident management of the defendants' ship does not imply that any act was done by them. After having been guilty of the negligence which led to the mischief, they may have done every thing in their power to avoid the mischief, and then the running against the plaintiffs' vessel may have been owing to the wind and tide. It does not appear, upon this record, that the defendants wilfully did the act. If the fact were so, they should have taken this objection at the trial; but after verdict, we must understand that that was not the fact.

Per CURIAM: *Rule discharged.*

Note.—The above report is retained as a case illustrating a principle, as well as a leading case on a point which before the Common Law Procedure Act of 1852 was of great practical importance. See *Morley* v. *Gaisford*, 3 R. R. 432, and note in Editor's preface to that volume.

It may be observed that the view apparently held by Lord

† *Howard* v. *Banks*.

KENYON, that in every case of damage immediately resulting from a wilful act trespass was the only remedy, was even in his time thought too narrow. See the judgment of BAYLEY, J. in *Moreton* v. *Hardern* (1825) 4 B. & C. 223, 227, and cases collected in Smith's Leading Cases, notes to *Scott* v. *Shepherd*.—R. C.

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THE KING *v.* G. GASKIN, D.D.

(8 T. R. 209—210.)

1799. *April* 17.

A return (to a mandamus to restore) insufficient, because it did not state that the party had been summoned to answer to the charge before he was removed. [209]

THE defendant, the rector of the united parishes of Saint Bennet, otherwise Benedict Gracechurch and Saint Leonard Eastcheap, in London, having been called upon by a mandamus, to restore John Fulbrook to the office of parish-clerk of the said united parishes, made a return to the mandamus; in which he assigned several causes for the removal of the clerk. After enumerating the different causes which shewed the indecent and indecorous conduct of the clerk, on several occasions, and among others, that the clerk was on a certain day intoxicated during divine service, and incapable of performing his office, and that he officiated in an improper part of the church, the return concluded thus: That "for and on account thereof, in the presence of the said J. Fulbrook, and also in the presence of the churchwardens of the said united parishes, I did as such rector aforesaid, remove and dismiss the said J. Fulbrook from his place and office of parish-clerk," &c.

Jervis took several objections to the return; but it is only necessary to mention one, on which the Court adjudged that the return was insufficient, namely, that it did not appear that Fulbrook had ever been summoned to answer before he was removed, and consequently, that he had had no opportunity of making any defence to the charges brought against him.

Park, in answer to this objection, relied on several cases;

THE KING v. G. GASKIN.

1. *Rex* v. *The Mayor, &c. of London*,† where the Court refused to grant a mandamus to restore P. Roberts to an office from which he had been suspended, without having had notice to make his defence, it appearing that there was good ground for the suspension; 2. *Rex* v. *The Mayor, &c. of Axbridge*,‡ where a mandamus to restore was refused for a similar reason; 3. *Rex* v. *Tidderley*,§ where the same point was determined on a return to a mandamus. There the mayor returned (to a mandamus to restore Tidderley to the office of a burgess of a corporation) that he had removed Tidderley at his own request; an objection was taken to the return, and the Court said, that though the return was insufficient, yet as it appeared that the party had no cause to be restored, they would not restore him; and so, they said, it was ruled in *Winchester's* case; 4. *Rex* v. *The Mayor, &c. of London*;‖ where an objection taken to [*210] *a return to a mandamus, to restore Mr. Wooldridge to the office of alderman, that it was not stated that the alderman had notice to defend himself, but only that he had been summoned to attend in his place as alderman, was over-ruled.—Besides which, it was contended that in this case it must be understood that the clerk was not condemned unheard, it being stated in the return that Doctor Gaskin, "in the presence of the said J. Fulbrook," &c. removed him, &c. That the facts returned must be taken to be true: for if false, the clerk may have his action for a false return; and if true, he ought not to be restored for a mere informality, because the instant he is restored Doctor Gaskin may again remove him in a more formal manner.

LORD KENYON, Ch. J.:

If we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, *audi alteram partem*. The two first cases cited in support of this return, by no means warrant the position for which they were cited: there the application was for a mandamus to restore; and on hearing the whole case, this Court refused to grant the writ, because it appeared on the party's own shewing, that he ought to have been removed. In the next case cited, the party

† 2 T. R. 177. ‡ Cowp. 523. § 1 Sid. 14. ‖ M. 26 Geo. III. B. R.

must have had notice, because it appears that he was removed at his own request. And in the last case Mr. Wooldridge was summoned to attend in his place as alderman, which perhaps was considered as equivalent to formal notice. It is to be found at the head of our criminal law, that every man ought to have an opportunity of being heard before he is condemned: and I should tremble at the consequences of giving way to this principle. I have no doubt but that Doctor Gaskin has acted on this occasion from the best motives; and notwithstanding our decision, he will be perfectly justified in renewing his accusation against this person, and in removing him from his office in a more formal manner if the charge is true.

GROSE, J.:

The offences charged on the clerk are abundantly sufficient to warrant Doctor Gaskin in removing him: but the present proceeding is informal, and the return to the mandamus is insufficient.

LAWRENCE, J.:

This was one of the grounds on which the return in *Bagg's* case* was holden to be insufficient.

The COURT therefore awarded a peremptory mandamus to restore Fulbrook.

GARRELS AND ANOTHER *v.* KENSINGTON.

(8 T. R. 230—235.)

1799. *April* 23.

[230]

A warranty of Danish property (Denmark being then a neutral power) in a policy of insurance on ship and goods, was holden to be conclusively disproved by a sentence of a Court of Admiralty condemning the ship and cargo because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship which had been seized and carried into port by a belligerent power, for the purpose of search. Any forfeiture of neutrality by the wilful act of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty.

THE plaintiffs declared upon a policy of insurance, which they, as agents for Frederick Westerman and Martin Viendt, caused

* 11 Co. Rep. 99 a.

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to be effected for their principals, on goods valued at 2,900*l.* on board the ship *Dispatch*, at and from St. Thomas to the Havannah, Danish ship and property: and they stated that in the prosecution of the voyage insured, the ship with the goods on board was in a hostile manner attacked, taken, and carried away by persons unknown. At the trial before Lord Kenyon at Guildhall, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:—The defendant subscribed the policy of 200*l.* upon the cargo of the ship *Dispatch*, warranted Danish ship and property, on a voyage at and from St. Thomas to the Havannah. F. Westerman and M. Viendt, who were [*231] owners of the ship, *and interested in the property insured to the amount stated in the declaration, were Danish subjects residing at the Danish Island of St. Thomas; and the ship had on board a register, sea-letter, and general clearance from the Custom-house Judge and Commandant, and the captain's letter of instructions, being the ship's papers usually carried by Danish ships. The loss arose by capture, as stated in the declaration; the circumstances attending which loss are disclosed in the following sentence of condemnation given against the ship in the British Vice-Admiralty Court at St. Domingo, upon a suit there instituted upon the relation of Thomas White, Esq. commander of his Majesty's sloop of war the *Pelican*:—"And now on this present 9th of November, 1797, Mr. *Advocate-General* having moved for the judgment of the Court, his Honour the Judge, after going through the whole of the evidence, and considering that it thereby appeared, That the said neutral ship *Dispatch*, with the cargo on board, being Danish property, had been under the authority of the laws of nations and of war, and agreeably to existing treaties, stopped and detained by John Gascoyne, Esq. commander of his Majesty's sloop *Pelican*, and by him sent towards the port of Mole, St. Nicholas, for the purpose of being legally examined, under the command and direction of Dennis Barrett, a midshipman of the sloop *Pelican*, as prize-master, with two seamen; that on the near approach of the said ship to the harbour of Mole, St. Nicholas aforesaid, the said master, supercargo, and crew of the said ship *Dispatch*, had, in direct violation and breach of their neutrality as Danish

subjects, and contrary to the law of nations and the faith of treaties, violently and forcibly, at a preconcerted signal, seized and taken possession of the said ship and her cargo, from and out of the hands and possession of the said Dennis Barrett and his two seamen, and had retained possession thereof, till again captured by a certain French privateer; and that the said ship *Dispatch* and her cargo were again captured and taken by his Majesty's said sloop of war *Pelican*, then under the command of Thomas White, Esq. the relator in this cause; and after stating his reasons at large, he was pleased to adjudge and decree, that the said neutral ship or vessel called the *Dispatch*, her tackle, &c. and the goods, &c. on board her, taken and seized by Thomas White, Esq. commander of his Majesty's said sloop *Pelican*, &c. were and are good and lawful prize; and to order, adjudge, and decree, that the same be confiscate and condemned to our sovereign lord the King, to the use of the said Thomas White, *&c. relators in this cause; and that the same be now sold, and the monies distributed," &c. As soon as the above sentence was known to the assured, they abandoned to the underwriters. The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover? if so, the verdict to stand; if not, then a verdict to be entered for the defendant.

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Park for the plaintiffs:

The question is, Whether the warranty of the ship and cargo, being Danish, has been complied with? as to which the case states, That the owners were Danish subjects, residing in the Danish island of St. Thomas; and that the ship had on board all the papers usually carried by Danish ships; and the sentence itself states, that the property was neutral and Danish: but if it be contended that the sentence, which condemns the ship and cargo for a breach of neutrality, is conclusive, it may be answered, that it is only conclusive as to the grounds on which the sentence itself proceeds, as was said in *Calvert* v. *Bovill*,† where the French Court of Admiralty, having condemned an American vessel as good prize, for reasons stated in their sentence, which this Court thought did not necessarily lead to such a conclusion,

† *Ante*, p. 517.

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they held that such sentence was not conclusive evidence against the warranty of neutrality. Now here, the sentence does not negative that the ship and cargo were originally neutral; but only states facts from whence the Court concludes, that she afterwards forfeited her neutrality; which facts, when examined, do not warrant that conclusion: for it is no where stated that Danish ships are bound by any treaties with England to submit to be searched, much less to be violently taken possession of, and carried out of the course of their voyage into our own ports for that purpose. Nor does it appear upon reference to the treaties subsisting between the two countries, that any such right exists. (Here the Court intimated their clear opinion, that the sentence of condemnation by a Court of competent jurisdiction, having expressly adjudged that the ship, by the acts stated, had "broken her neutrality, and acted contrary to the laws of nations and the faith of treaties," had concluded that question; and that they could not examine into the propriety of the conclusion.) *Park* then referred to the case of *Saloucci* v. *Johnson*† as in point. There a Tuscan ship, warranted neutral, was taken by a Spanish vessel, and condemned, on the grounds that she had refused to be searched, and had resisted with force; and that she had
[*233] no charter-party on board: but this Court *held the underwriters liable notwithstanding the sentence, which was unfounded upon the face of it, because, by the law of nations (the only law upon which it purported to be founded) a neutral ship was not bound to submit to be searched. This, therefore, appears on the face of the sentence to have been an illegal act of the captors, to which the Danish Captain was not bound to submit; and consequently the sentence is not conclusive against the warranty of neutrality in this case. But even, if such a right of search did exist by particular treaty between the two countries, at most, the act of the captain in resisting the search would only amount to barratry, for which the underwriters are liable.

Scarlett, contrà:

In every warranty of neutrality there is an implied undertaking on the part of the assured, that the ship shall so conduct

† B. R. Trin. 25 Geo. III.; Park's Insur. 415.

herself during the voyage as not by any voluntary act to forfeit the privileges of neutrality; without which such a warranty would be nugatory. This includes an undertaking, that the ship shall be navigated according to treaties. * * The sentence of condemnation, being a sentence of a Court of competent jurisdiction, and grounded on that very circumstance, is conclusive between the parties. * * This case is distinguishable from that of *Saloucci* v. *Johnson;* for there the sentence of condemnation did not purport, as here, to proceed on the ground of particular treaties; and therefore it was competent to the Court to examine whether the grounds there stated were warranted by the law of nations. But here the sentence expressly alleges that the breach of neutrality was in violation of the faith of treaties, as well as of the law of nations; and the Court of Admiralty were the proper judges of the treaties between the countries.

After the first argument it was observed by the defendant's counsel, that there was no count as for a loss by barratry, and therefore the plaintiffs could not at any rate avail themselves of any question of that kind: but that the defendant was ready to waive the want of such a count, in order that the opinion of the Court might be taken on the principal question. [234]

LORD KENYON, Ch. J.:

If the parties wish to have a second argument, I shall not object to it; but at present it appears to me that the plaintiff is not entitled to recover, notwithstanding the case of *Saloucci* v. *Johnson*. That case professed at last to proceed on this ground: —That the arbitrary ordinances of one country ought not to conclude the rights of other parties; and that courts of justice ought to proceed on the acknowledged law of nations, and on the existing treaties between the different states. But that case is important in another point of view; it lays down certain other principles to which I accede, namely, That though it is not necessary that a ship warranted neutral should continue neutral during the whole voyage, because if she be neutral at the time of sailing, the breaking out of war the next day will

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not discharge the underwriter, yet the ship must not forfeit its neutrality by the misconduct of the parties on board. Now, in this case, the ship and cargo were warranted to be Danish; and the case of *Saloucci* v. *Johnson* says, that a ship that is warranted neutral, must be so conducted as not to forfeit its neutrality. Then, was this ship so conducted? In order to decide that question, we must look to the sentence of the Court of Admiralty; that sentence which we cannot review, has expressly stated, "That the master and crew of the ship *Dispatch* in direct violation and breach of their neutrality as Danish subjects, and contrary to the law of nations and the faith of treaties, violently seized and took possession," &c. If we had constituted that Court, perhaps we should have drawn a different conclusion from the facts there stated: but we are now concluded by that sentence; and so it was holden in the late case of *Christie* v. *Secretan*. Therefore, conformably to that case, and not contradicting that of *Saloucci* v. *Johnson*, I think that the defendant is entitled to our judgment. With regard to the question concerning the right of searching neutrals; before the late armed neutrality, it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations; and it was supposed to be founded on reason.

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GROSE, J.:

This ship, though not in terms warranted to be neutral, was so warranted in effect; for she was warranted Danish, for the purposes of having the advantages of neutrality. Then, if warranted neutral, she should have so conducted herself as not to lose its neutrality: but, on looking into the sentence of the Court of Admiralty, we find that the only ground of condemnation was, her having done a certain act, in violation and breach of her neutrality, and contrary to the law of nations and the faith of treaties. Then, for the purpose of this insurance, the ship was not Danish, and consequently the plaintiffs are not entitled to recover.

LAWRENCE, J.:

The plaintiffs' argument, founded on the case of *Saloucci* v.

Johnson, proceeds on a supposition, that a point was there decided that was not determined; it was not there decided that this Court can review a sentence of the Court of Admiralty, adjudging that a ship has forfeited her neutrality; for there it was not adjudged by the Court of Admiralty that the ship had forfeited her neutrality. But looking into the grounds of this sentence, we cannot but see that the ship was condemned for having violated her neutrality, and acted contrary to the law of nations and the faith of treaties. With regard to the other point, there is no count in this declaration for a loss by barratry.

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Postea to the defendant.

K. B. TRINITY TERM.

HADLEY *v.* CLARKE AND OTHERS.

(8 T. R. 259—268.)

1799. *May* 28.

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The defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel's arriving at Falmouth in the course of her voyage, an embargo was laid on her "until the further order of Council;" held that such embargo only suspended,† but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract.

IN assumpsit, the declaration stated that the defendants were owners of the ship *Pomona*, and that, in consideration that the plaintiff had caused divers goods to be shipped on board the *said ship, then bound on a voyage from Liverpool to Leghorn, with liberty to proceed singly to Falmouth, and such other ports as might be necessary in order to join convoy, the defendants undertook for a stipulated freight to deliver the said goods at Leghorn, the dangers of the seas only excepted; that the ship afterwards sailed from Liverpool to Falmouth to join convoy,

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† The case is distinguished in the judgments in *Geipel* v. *Smith* (1872) L. R. 7 Q. B. 404, 414, 41 L. J. Q. B. 153; *Jackson* v. *Union Marine Insurance Co.* (1873-4) L. R. 8 C. P. 572, 42 L. J. C. P. 284, L. R. 10 C. P. 125, 133, 44 L. J. C. P. 27; *Dahl* v. *Nelson* (1881) 6 App. Ca. 38, 53, 50 L. J. Ch. 411.—R. C.

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and that after arriving at Falmouth on the 30th of June 1796, she abandoned the voyage, and returned from Falmouth with the said goods to Liverpool; whereby the plaintiff was not only deprived of the benefit of having his goods carried to Leghorn, but also of divers policies of assurance which he had caused to be effected upon the said goods, for the said voyage, and for which he had expended 297*l.* 18*s.* There were also common counts. Plea, The general issue. At the trial at Guildhall before Lord Kenyon, a verdict was found for the plaintiff for 297*l.* 18*s.* subject to the opinion of this Court on the following case:—

In June, 1796, the plaintiff shipped goods of the value of 1,768*l.* on board the *Pomona*, whereof the defendants were owners, to be carried from Liverpool, upon a voyage mentioned in the declaration, and procured the goods so shipped to be insured for the voyage from Liverpool to Leghorn, and paid 297*l.* 18*s.* for premium thereon, including the charges of brokerage and the policy. The ship afterwards sailed from Liverpool with the goods of the plaintiff and other shippers on board, and proceeded to Falmouth to join convoy for the voyage to Leghorn. She arrived at Falmouth on the 30th of June, 1796; and during her stay there waiting for convoy, an embargo was laid on all ships bound to Leghorn, one of the ports in the territories of the Grand Duke of Tuscany, and then in the possession of the French Republic, by an order of his Majesty in council, of the 27th July, 1796; which embargo was directed to continue until further order of the Board of Privy Council. The ship was thereby prevented from then further proceeding upon her voyage.

By another order of his Majesty in council, dated the 23rd of August, 1796, it was ordered that the embargo so laid on should be taken off, so far as to permit the ships and vessels ready to sail for any of the ports before described to proceed from the ports where they then were to ports where they might have respectively taken their several cargoes on board,—provided that the master of such ships or vessels first gave security, &c. that the said ships should return to their respective ports of lading,

[*261] under convoy of such of *his Majesty's ships as should be appointed to convoy the same, and should proceed with such convoy, and not desert the same on the voyage till their arrival

at their respective ports of lading, or so long as such convoy should be instructed to protect the said ships; and it was thereby further ordered, that the said ships, upon their arrival at the ports where they respectively took in their several cargoes, be permitted to re-land the same, and deposit the goods in warehouses, to be approved of by the proper officers of the revenue of customs and excise, &c. at the expense of the proprietors; and that the proprietors be at liberty to take the same out of the said warehouses for exportation, under the usual regulations, if they should so think fit, or for home consumption, upon repayment of the respective drawbacks, if any should have been obtained on the said goods, &c. On the 7th of May, 1798, the plaintiff received notice from the defendants, that unless they would receive back the goods by them shipped on board the *Pomona*, pay the freight, and give up the bills of lading, or a bond of indemnity, with sufficient sureties against any damage which the owners or master of the *Pomona* might sustain, by reason of the bills of lading not being delivered up, they would within twenty-one days, cause the remainder of her cargo to be re-landed, and the goods shipped to be warehoused on the account and at the risk of the person and persons to whom the same belonged. In June following, he also received from them a further notice, which, after referring to the order of Council of the 27th of July, 1796, and the 23rd of August, 1796, concluded as follows: "We, the owners of the brigantine *Pomona*, James Dunn master, now lying at the port of Falmouth, having concluded to act agreeably to the directions contained in the said recited order (*i. e.* the last) do hereby give you notice, that after the expiration of fourteen days from the date hereof, we shall cause the said vessel, and such part of her cargo as now remains on board, to be brought to Liverpool, and there re-land and warehouse the same, agreeably to the directions of the said order, unless you shall choose to have them re-landed at Falmouth; and shall, without delay, obtain a lawful authority for that purpose, and give notice to the master of the said vessel of such your intentions, within a reasonable time after the service thereof; and we do further give you notice, that the goods so laden as aforesaid, will be brought to the port of Liverpool at the

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risk of the respective owners or proprietors thereof: but if the owners or proprietors shall think fit to cause the same to be insured for the said voyage to Liverpool *aforesaid, such insurance shall and may be effected without prejudice to any legal or equitable question between us as owners of the said vessel, and the owners or proprietors of the said goods respectively, or any of them." The said ship remained at Falmouth until the middle of August, 1798, during all which time the embargo continued; at which time she, without the consent of the plaintiff, set sail with his goods on board from Falmouth for Liverpool, under the protection of the order of Council of the 23rd of August, 1796, and complied with all the requisitions of such order; and shortly afterwards arrived at Liverpool. After the ship's return to Liverpool, the plaintiff, by agreement with the defendants, received his goods back, but without prejudice to his right to recover in this action. On the 24th of October, 1798, nearly two months after the ship's arrival at Liverpool, by an order of his Majesty in Council, the embargo laid on by the order of the 27th July, 1796, as far as related to ships bound to Leghorn, was wholly taken off. The question for the opinion of the Court is, Whether the plaintiff be entitled to recover in this action?

This case was argued in the last Term by *Giles* for the plaintiff, and *Scarlett* for the defendants; and now by *Gibbs* for the plaintiff, and *Wood* for the defendants.

For the plaintiff it was insisted, that the embargo did not discharge the defendants from the obligation of their contract to carry the goods to Leghorn. An embargo in its nature is only temporary; and it was expressed in this instance to be only "until the further order of Council." Therefore, admitting it to be as imperative on the parties as an Act of Parliament, yet it is not like a general unlimited prohibition; making that unlawful which was before lawful, but at most operated as a suspension only, and not as a dissolution, of the contract; and when the suspension was taken off, the former liability of the defendants to perform their undertaking again attached upon them. Herewith agrees 1 Valin. Comment. 627, art. 8th. * * Both

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parties must either be equally bound or equally discharged: and if the defendants, by their sole act, could put an end to the contract at Falmouth, and call on the plaintiff to take away his goods, and pay his freight *pro ratâ*, then the plaintiff might equally have demanded his goods at the same place on the like terms: but the contrary was holden in *Luke* v. *Lyde*;† and therefore the right contended for by the defendants cannot be well founded.

For the defendants it was argued, that this case falls within the general rule, that where a contract, which was possible and legal at the time of making it, becomes afterwards impossible by the act of God, or illegal by an ordinance of the state, the obligation is discharged. 1 Rol. Abr. 451, title "Condition." *Williams* v. *Hide*, 2 Palm. 548, W. Jones, 179, S. C.; Dy. 28 a, pl. 186; *Brewster* v. *Kitchin*, 1 L. Ray. 317, 321; Salk. 198, S. C.; *Beterworth* v. *Dean and Chapter of St. Paul's*, 2 Eq. Cas. Abr. 26.‡ The reason on which those cases are founded is, that in every contract it is to be presumed that it was not in the contemplation of the parties to stipulate for impossible things. * * The case of *Draddy* v. *Deacon* § is in point. There [264] the plaintiff had freighted the defendant's ship for a certain voyage, at so much per ton; and, pending the contract, an embargo was laid on for six weeks; after which the ship sailed; and the defendant, concealing his agreement from the plaintiff's agents abroad, stipulated with them for the payment of a larger freight: The defendant having recovered at law upon that last agreement, the plaintiff filed his bill to be relieved, on the ground of the fraud in concealing the first agreement: but the Court dismissed the bill, on the express ground that the embargo having obstructed the performance of the first agreement, the defendant was at liberty to make a new one. Now, such a decree could not have been made, unless the Court had been of opinion that the embargo had dissolved the original contract. And *Molloy*,‖ citing that case, considers an embargo as having that operation. * * *

† 2 Burr. 882.

‡ But see the distinction taken in this case in Dom. Proc. *ib.*

§ 2 Vern. 242.

‖ B. 2, ch. 2, s. 3.

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In reply it was observed, that it never had been determined that a policy of insurance extends to indemnify the assured against a loss by means of an embargo laid in this country; and even if the assured could abandon, by reason of the loss of the [*265] voyage, he *could only recover from the underwriters the value of the goods, which would be no indemnity for the loss of the market. Besides, no consideration of this sort can affect the construction of the contract between these parties. The defendant's argument is founded on a supposition that the embargo rendered the voyage illegal; whereas the only effect of it was to delay the performance of the voyage. The case in Vernon is quite unintelligible, and cannot be law to the extent to which it is attempted to be carried. * * *

LORD KENYON, Ch. J.:

Whenever a case comes before us that is likely to be attended with hardship to the parties, a struggle naturally arises in our minds to find out (if possible) some way of extricating all the parties from it. In the present case, both parties are innocent; and whatever may be our decision, one party or the other must suffer. In such a situation we must explore our way as well as we can; but we must determine according to the principles of law. By the terms of this contract the defendants undertook to carry the plaintiff's goods from Liverpool to Leghorn for a certain price; the plaintiff now charges the defendants with not having fulfilled their agreement, and claims an indemnity for the loss which he has sustained by reason of the non-performance of the contract on their part: in answer to this the defendants say, that they are not answerable, on account of the embargo that was imposed when the ship was lying at Falmouth; and in the course of the argument, I expected that the defendants' counsel would have drawn the line, and would have shewn, that though an embargo of a certain duration would not put an end to such a contract as the present, an embargo of some longer duration would. But no such line has been, or I believe, can be drawn. It is admitted, that an embargo being imposed during the war, was a legal interruption of the voyage: but it would be attended with the most mischievous consequences if a temporary embargo

were to put an end to such a contract as this; because, if it were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages. The difficulty in this case is to draw the line; the defendants contracted with the plaintiff to carry his goods to Leghorn; that contract was certainly *obligatory at the time when it was made; and it must continue to be binding unless it has since been put an end to. Then, at what time was it put an end to? was it put an end to during the ship's stay at Falmouth, or immediately after she sailed for Liverpool? It would afford an argument against the defendants in this particular case that they kept the goods on board during all this time, and thought they were bound by this contract.—However, I do not decide this case on that ground, but on the general ground that a temporary interruption of a voyage by an embargo, does not put an end to such a contract as this. If this contract were put an end to, it might equally be said, that interruptions to a voyage from other causes would also have put an end to it: *e.g.* a ship being driven out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the north-west parts of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark, where they have been obliged to winter. The case that has been cited from Vernon furnishes us with no principle of decision; the report of it there is very unsatisfactory; and no trace of it is to be found in the Register's book. There being therefore no decision in favour of the defendants, and the plaintiff wishing to enforce his contract, I cannot feel myself justified by any principle of law to say, that the contract was put an end to by this temporary embargo; but I am of opinion that, however hard or inconvenient it may be to the defendants, the plaintiff is entitled to recover.

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GROSE, J.:

This seems to be a case of peculiar hardship either on the one side or the other, and therefore we must determine it according to the strict rules of law. This contract was certainly binding on these parties at the time; and I agree with the defendants' counsel that the true meaning of it was, that the defendants were

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bound to convey the plaintiff's goods within a reasonable time. After the contract was made, an embargo was imposed, which was only a temporary restraint, and prevented the ship's performing her voyage at that time; but still the defendants were bound to comply with the terms of the contract as soon as they reasonably could: even if we consider the embargo to have the same effect as an Act of Parliament, still it would only create a temporary restraint, until such time as the King in council should take off the embargo. Such an Act of Parliament would not dissolve, it would only *suspend the execution of the contract; [*267] and the embargo cannot have a greater effect. If the embargo dissolved the contract, when did the dissolution take place? The mere stating of the question puts an end to all further enquiry: the defendants' counsel could not shew at what precise time the contract was dissolved: and if this contract were dissolved by the embargo, it would be followed by the very alarming consequence stated at the bar, that all the contracts between the owner and the mariners would also be put an end to. Here, neither of the parties being in fault, the strict law must take place. The defendants have not done that which, by their contract, they were bound to perform; and, therefore, the plaintiff is entitled to recover the damages which he has sustained by reason of their non-performance of the contract.

LAWRENCE, J.:

This is certainly a case of hardship on the defendants; but I do not see any legal grounds on which they can be excused paying the damages which the plaintiff has suffered in consequence of their not having performed their engagement. The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains: they contended, That the defendants were only bound to fulfil their engagement within a reasonable time; and then argued, That as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from their engagement altogether: but it was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to

Leghorn. They accordingly did express the terms; and absolutely engaged to carry the goods, "the dangers of the seas only excepted;" that therefore is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In All. 27, this distinction is taken:—"Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." So, in this case, there *was one accident against which the defendants provided by their contract: they might also have provided against an embargo; but we cannot vary the terms of this contract; and the defendants must be bound by the terms of the contract that they have made. [*268]

Postea to the plaintiff.

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THE KING *v.* J. WRIGHT.

1799. *June* 3.

(8 T. R. 293—298.)

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The Court refused to grant a criminal information against a bookseller for printing a report of the House of Commons, though it reflected on the character of an individual.†

A RULE having been obtained, calling on the defendant (a bookseller) to shew cause why a criminal information should not be granted against him for printing and publishing a libel on J. Horne Tooke,

Law, *Gibbs*, and *C. Moore*, were now to have shewn cause against it; but after producing an affidavit made by the defen-

† As to the privilege of a report of proceedings of body established by Act of Parliament for a public purpose, see *Allbutt* v. *The General Council of Medical Education*, &c. (C. A. 1889) 23 Q. B. D. 400, 58 L. J. Q. B. 606. As to reports of judicial proceedings, see *Curry* v. *Walter*, p. 717, *post*, and note there. As to statements made at a meeting of the London County Council for licensing purposes, see *Royal Aquarium*, &c., *Co.* v. *Parkinson*, C. A. 6 & 20 Feb. 1892, where the Court, finding express malice, held that the statements were not privileged.—R. C.

THE KING v. J. WRIGHT.

dant, in which he stated, that the charge on Mr. H. Tooke was a paragraph contained in the Report of the Committee of Secrecy of the House of Commons,† a literal copy of which he had published, and that he did not publish the Report with a view to calumniate Mr. H. Tooke, the Court called on the counsel for the prosecutor to support the rule. The paragraph complained of, and which was contained under the title, "Attempts to assemble a Convention of the People in England," was as follows: "Some of the persons so arrested were prosecuted for high treason. A grand jury for the county of Middlesex found a bill against Thomas Hardy, the secretary of the London Corresponding Society, and eleven others; three of the persons so indicted viz. Thomas Hardy, John Horne Tooke, and John Thelwall, were tried, and on their trials were acquitted of the charge in the indictment. But the evidence given on those trials established, in the clearest manner, the grounds on which the committees of the two Houses of Parliament had formed their Reports in 1794; and shewed beyond a possibility of doubt that the views of these persons and their confederates were in their nature completely hostile to the existing government and constitution of this kingdom, and went directly to the subversion of every established and legitimate authority."

Erskine, and *Warren*, in support of the rule:

First, The matter published, supposing the matter not sanctioned by any legal authority, is a libel on Mr Horne Tooke. Secondly, It is such a libel that the Court are bound by the rules that have always guided their discretion in similar cases, to give the prosecutor leave to file a criminal information against
[*294] the *publisher. Thirdly, The House of Commons themselves were not justified in directing or giving a sanction to the publication of this libel on Mr. H. Tooke; or at all events, they have no legal authority to direct or sanction the publication of matter

† "To whom the several papers referred to in his Majesty's message of the 22nd of January, 1799, and which were presented, sealed up, to the House by Mr. Secretary Dundas, on the 22nd of January, by his Majesty's command, were referred; and who were directed to examine the matters thereof, and report the same as they should appear to the House;" Ordered by the House to be printed for the use of the members, the 15th of March, 1799.

that amounts to a libel on any individual beyond an entry on its own journals, or for the use of the members of the House. Fourthly, But even if they possessed such an extraordinary power, the House having in this instance only directed an entry on its own journals, and ordered the printing (by their own printer) of as many copies of this Report as were sufficient for the use of the Members of the House, that does not give the defendant, a stranger, the right of printing and circulating copies of it, so as to furnish him with a legal defence either to an action for damages, or to an information, or indictment for a libel. In support of the two first propositions, the counsel read and commented upon the passage in question. Thirdly, The House of Commons were not justified in making the Report in question, inasmuch as it reflected on innocent individuals. It is the undoubted right of every subject who is accused of a crime, to be tried by a jury of the country; and as it appeared on the former part of this very paragraph that Mr. H. Tooke had been acquitted by a jury, it was a foul libel on him to say, that he was guilty of the crime of which he had been acquitted. In the case of *R.* v. *Sir W. Williams*,† where an information was filed against the defendant, who had been Speaker of the House of Commons, for publishing a libel (Dangerfield's narrative) it was determined by this Court that the defendant was not justified in publishing, though he had published as Speaker, and by order of the House of Commons. This determination still remains in force, notwithstanding several attempts in Parliament to get rid of it. And Sir Robert Atkyns, in his Treatise on the Power, Jurisdiction, and Privileges of Parliament, vindicates the legality of this determination. This decision therefore proves, that the House of Commons themselves cannot justify the publishing of any matter reflecting on an innocent individual. In the case of *Cuddington* v. *Wilkins*,‡ where the plaintiff brought an action for words accusing him of felony, which the defendant justified, and the plaintiff replied a pardon, it was adjudged for the plaintiff; "for the whole Court were of opinion, that though he were a thief once, yet when the pardon came, it took away not *only [*295] *pœnum* but *reatum*." Now, that is a stronger case than the

† 2 Show. 471; Com. 18; 10 St. Tr. App. 33, n. ‡ Heb. 81.

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present; for there it was admitted, that the plaintiff had been guilty of the felony though he had been pardoned; but here Mr. H. Tooke was innocent of the charge; for the jury acquitted him of it. Though the House of Commons may be invested with a right of inquiring into the existence of high crimes, either for the purpose of impeaching an individual or of making new laws, it is evident that the inquiry in this instance could not have been made for the purpose of impeaching Mr. H. Tooke, since he had been before legally acquitted of the charge; and if the report were made as the foundation of any Legislative act, it ought not to have charged persons to be guilty of a crime of which a jury had previously pronounced them innocent. But, even if the House of Commons cannot be called to account for making this report, they could not sanction the publication of it beyond an entry on its own journals, and printing copies of it for the use of their own members. Fourthly, In the case of *Lake* v. *King*,* where a petition was presented to a committee of the House for examination of grievances, reflecting on the plaintiff's conduct, and the defendant distributed printed copies to the members of the committee, it was not pretended that the defendant could distribute the copies to other persons not members of the House; and this Court said, "That the printing with intent to deliver the copies to members of the committee was justifiable; but if he had delivered them to others it would be otherwise." Now, in this case the defendant has published copies of this Report for general circulation. It is even a contempt of Court to publish the proceedings of Courts of Justice; and still more so, where those proceedings reflect on the character of an individual. In *Waterfield* v. *The Bishop of Chichester*,† where the defendant complained to the Court of King's Bench that the plaintiff had printed and circulated an account of a prohibition obtained by him against the Bishop, "the Court declared it to be a most seditious libel; and gave order to inquire after the printer that he might be prosecuted." It is also a breach of privilege and a contempt of the House of Commons to publish their proceedings without their authority; and yet that is the only defence which the defendant now attempts to make against

* 1 Lev. 240. † 2 Mod. 118.

this charge: but it seems rather extraordinary that the admission of one crime should be set up as a justification of another.

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LORD KENYON, Ch. J.: [296]

When the motion was first made, I suggested to the counsel for the prosecutor, that if the publication in question really were, what it professed to be, a copy of the Report of the House of Commons, it would be wrong to grant a rule to shew cause; but it not being then admitted to be a true copy, and it being surmised that the publication assumed a title that did not belong to it, we granted a rule *nisi*; but as it now proves to be a true copy of the Report, I think there was not the least pretence for the motion. This is an application for leave to file a criminal information against the defendant for publishing a libel; so that the application supposes that this publication is a libel. But the enquiry made by the House of Commons was an inquisition taken by one branch of the Legislature to enable them to proceed further, and adopt some regulations for the better government of the country: this Report was first made by a Committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now *sub judice;* and yet it is said, that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the Houses of Parliament is a libel; and yet that is to be taken as the foundation of this application. The case of *R.* v. *Sir W. Williams*, which was principally relied on, happened in the worst of times; but that has no relation to the present case. There the publication was a paper of a private individual; and under pretence of the sanction of the House of Commons an individual published: but this is a proceeding by one branch of the Legislature, and therefore we cannot inquire into it. I do not say that cases may not be put in which we would not inquire whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their Serjeant at Arms to arrest a Counsel here who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action, undoubtedly we should pay no

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attention to it. But the Report in question, being adopted by the House at large, is a proceeding of those who, by the constitution, are the guardians of the liberties of the subject; and we cannot say that any part of that proceeding is a libel.—I am therefore clearly of opinion that this rule ought to be discharged.

GROSE, J.:

This is a motion for leave to file a criminal information for
[*297] publishing a supposed libel, but in truth, for publishing *a proceeding of one branch of the Legislature, when they were acting for the safety of the State. Now, on looking into the judicial proceedings of this Court, I find no instance of such an information as the present. The case of *R.* v. *Sir W. Williams* is most like this case; but it must be remembered, that that was declared by a great authority to be a disgrace to the country.

LAWRENCE, J.:

This case has been chiefly argued on two grounds: First, It is said, That the Report of the House of Commons is itself unjustifiable, inasmuch as it imputes a crime to the prosecutor, and deprives him of his privileges. It is said, That this Report charges him with being guilty of high treason, notwithstanding a verdict of the jury had ascertained his innocence; but that is not the fair import of the paragraph. It is possible that a man may have views hostile to the government and constitution of the kingdom, without being guilty of high treason, especially of the particular treason imputed to the persons there mentioned. It does not therefore follow that this Report charges those persons with the same crime of which they had been before acquitted: but the chief ground taken by the prosecutor's counsel is, That though the Report of the House of Commons cannot itself be considered as a libel, the defendant, not acting under the authority of the House, may be indicted for publishing it, with a view to general circulation. It has been said, That the publication of the proceedings of Courts of Justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield* v. *The Bishop of Chichester*

has been cited: but on examining that case, it appears that the charge there was, that the plaintiff had not published a true account. There the plaintiff suggested for a prohibition, that the Bishop had excommunicated him for refusing to take the oath, *ex officio*, on his being chosen churchwarden of Arundel: it afterwards appeared, that he was excommunicated for having refused to take the oath of a churchwarden according to law; and the ground of the prohibition being false, a consultation was awarded: then the plaintiff published a supposed account of the prohibition, entitled, "A true Copy of a Writ of Prohibition, granted, &c. against the Bishop of Chichester, who had proceeded against and excommunicated one T. Waterfield a Churchwarden, for refusing to take the Oath usually tendered to Persons in such Office; by which Writ the illegality of all such Oaths is declared," &c. Now that publication was not a true statement of the proceedings of the *Court: he at first obtained the prohibition on a false representation of the fact; and after the consultation was awarded, he published a false account of the proceedings in prohibition; and the Court declared, that such false account was a seditious libel. Therefore, I do not think that that case establishes the proposition to support which it was cited; and I am not aware of any authority that does support it. The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the Courts: but they are printed for the information of the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Currie against Walter, proprietor of *The Times*, for publishing a libel in the paper of *The Times*; which supposed libel consisted in merely stating a speech made by a counsel in this Court, on a motion for leave to file a criminal information against Mr. Currie. Lord Chief Justice EYRE, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this Court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all con-

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curred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in Parliament: it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller. Though therefore the defendant was not authorized by the House of Commons to publish the Report in question, yet, as he only published a true copy of it, I am of opinion that the rule ought to be discharged.

Rule discharged.

1799. *June* 8.

[308]

EXALL *v.* PARTRIDGE AND TWO OTHERS.

(8 T. R. 308—311.)

The goods of a stranger on the premises of another were distrained by the landlord for rent in arrear; and the stranger was obliged to pay the rent to redeem them: held that the stranger might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenants to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time.

THIS was an action, upon promises for money paid, laid out and expended, for the use of the defendants. At the trial before Lord Kenyon, at the sittings after last Term, it appeared in evidence, that the three defendants were lessees of certain premises, by deed from one Welch, to whom they thereby covenanted to pay the rent; and that two of the defendants afterwards, with the plaintiff's knowledge, assigned their interest to Partridge, the other co-lessee, who was a coach-maker; sub-

sequent to which assignment, the plaintiff put his carriage upon the premises, under the care of Partridge, where it was taken as a distress by Welch, the landlord, for rent in arrear; and the plaintiff, in order to redeem it, was obliged to pay the rent due, taking at the time a receipt from Welch's attorney, as for so much received on account of the three defendants. The present action was brought to recover that sum. The plaintiff was nonsuited, on the ground that the action *should have been brought [*309] against Partridge alone, he being the person in the sole possession of the premises at the time, with the knowledge of the plaintiff, who had trusted him only with the possession of his property; and he also being the person ultimately responsible to the other two defendants; and, therefore, it was said that the money must be taken to have been paid for his use only.

Garrow having obtained a rule, calling on the defendants to shew cause why the nonsuit should not be set aside; [the question was argued by *Erskine* for the defendants, and by *Garrow* and *Espinasse* for the plaintiff].

LORD KENYON, Ch. J.: [310]

Some propositions have been stated, on the part of the plaintiff, to which I cannot assent. It has been said, that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor, *nolens volens*. Another proposition was, That the assignment from two of the defendants to the third, was not evidence against the plaintiff, because he was no party to it; that also I deny: it surely was evidence to shew in what relation the parties stood to this estate. I admit that where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal: but none of those points affect the present question. As the plaintiff put his goods on the premises, knowing the

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interests of the defendants, and thereby placed himself in a situation where he was liable to pay this money, without the concurrence of two of the defendants, I thought at the trial that it was money paid to the use of the other defendants only; but on that point I have since doubted; and I rather think that the opinion I gave at the trial was not well founded.

GROSE, J.:

The question is, Whether the payment made by the plaintiff, under these circumstances, were such an one from which the law will imply a promise by the three defendants to repay? I think it was. All the three defendants were originally liable to the landlord for the rent: there was an express covenant by all, from which neither of them was released. One of the defendants only being in the occupation of these premises, the plaintiff put his goods there, which the landlord distrained for rent, as he had
[*31:] a right to do; then, for the purpose *of getting back his goods, he paid the rent to the landlord, which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent: it was not therefore a voluntary, but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff; and, on this short ground, I am of opinion that the action may be maintained.

LAWRENCE, J.:

One of the propositions stated by the plaintiff's counsel certainly cannot be supported, That whoever is benefited by a payment made by another, is liable to an action of assumpsit by that other; for one person cannot, by a voluntary payment, raise an assumpsit against another: but here was a distress for rent, due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore I am of opinion that this action may be maintained against the three defendants. The justice of the case indeed is, that the one who must ultimately pay this money, should alone be answerable here: but as all the three defendants were liable

to the landlord for the rent in the first instance, and as by this payment made by the plaintiff, all the three were released from the demand of the rent, I think that this action may be supported against all of them.

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LE BLANC, J.:

Not having been in Court when this motion was first made, I have not formed on the sudden a decisive opinion upon this case. But, at present, the inclination of my opinion is, That this action may be maintained against the three defendants, on this ground:—The three defendants were all by their covenant bound to see that the rent was paid; by their default in not seeing that it was paid, the plaintiff's goods were distrained for a debt due from the three defendants to Welch; by compulsion of law he was obliged to pay that debt; and, therefore, I think he has his remedy against the three persons who by law were bound to pay, and who did not pay this money.

Rule absolute.

THE KING *v.* THE COMMISSIONERS OF SEWERS FOR THE WESTERN DIVISION OF THE COUNTY OF SOMERSET.

1799. *June* 11.

[312]

(8 T. R. 312—314.)

If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected at the expense of the whole level.*

THIS was a rule, calling on the defendants to shew cause why a writ of *certiorari* should not issue, directed to them, to remove into this Court all and singular orders made by them for the erection of a new sea-wall in the parish of Huntspill. The order objected to was made by the commissioners at a special session, holden on the 22nd of January last, directing a new sea-wall to be constructed of 486 yards in length, in Huntspill parish, and ordering a rate to be made on all persons occupying or interested

* Followed in *The Queen* v. *Essex Sewers Commissioners* (1885) 14 Q. B. D. 561, and same case s. n. *Commissioners of Sewers for Fobbing, &c.* v. *The Queen* (H. L. 1886) 11 App. Ca. 449, 56 L. J. M. C. 1.—R. C.

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in the land throughout the level that had been affected by inundations, or might be prejudiced by the want of a sufficient sea-wall there.

In the affidavits in support of this rule it was stated, That from time immemorial, until the same was thrown down, a sea-wall stood on the spot, and in the line on which the new wall is directed to be built. That the particular persons applying for this rule, having lands in the level, never were, nor were the persons under whom they claim, rated to the repairs of the old sea-wall, in the room of which the new sea-wall is ordered to be built: that the level of Huntspill never was rated to the repairs of the old sea-wall; but the same was always repaired and rebuilt, from time to time, as occasion had required, by the owners and occupiers of certain particular lands in the level; and that the sea-wall had always been for that purpose marked out and divided into certain distinct allotments, corresponding with the number of persons, and with the number of distinct portions of land, of which they were respectively owners and occupiers, and in respect of which they had been used to repair the same: that the old sea-wall was, in the course of the last winter, thrown down by a storm.

These facts were not questioned on the other side; but it was stated in the affidavits, filed in answer to the rule, That about seven years ago, the waves of the sea in the Bristol Channel suddenly and unavoidably broke through a neck of land on the western side of the river Perrot (on the eastern side of which the sea-wall in question stands) which has been gradually increasing, through which the sea has for a year and an half entered the river opposite to part of the old sea-wall: that on the 10th of
[*313] *September last, and for some time before, the wall had been in more complete repair than formerly. That on September 11th, a most violent storm arose, accompanied by an extraordinary high tide, by which the sea was driven through the new channel directly against the sea-wall with much greater violence than could have happened if the new channel had not been formed. That by force of the waves, &c. the sea-wall was damaged in an extraordinary manner, it having been in many parts totally broken down and destroyed of the length of twenty feet each

that the waves also broke over other parts of the wall, seven or eight feet in height, and drove a boat several hundred yards on the shore. That the formation of the new channel and the damage done to the old wall were inevitable, and could not have been prevented by the persons who had been accustomed to keep the old wall in repair; and that such damage did not happen through their default or neglect. That the new channel is now increased to the breadth of half a mile, and the depth of 17 feet; and that ships have lately frequently passed through it. That to prevent the overflowing of the sea, it became absolutely necessary to raise new works of a different and more expensive construction, which cost about 3,000*l.*: a sum 30 times as much as would be necessary to rebuild the old wall.

Gibbs and *Dampier* now shewed cause against this rule; and relied on Callis on Sewers, 146, *Keightley's* case, 10 Co. 139 a, and the case of *The Isle of Ely*, 10 Co. 141, to shew that if the banks be destroyed by any extraordinary tide, or by tempest, without any default in the party who was bound to repair them, the expense of repairing must be borne by the level. In Callis, 146, it is said, "If the sea at the spring tides, or at extraordinary casual swelling tides or floods, have broke down the fences, and overthrown the banks, and drowned the country, without any default in the party who was tied to have repaired the same, the level shall in this case make up the breach; for things which happen extraordinarily by the sea or great waters, which neither policy of man could prevent, nor industry or force could resist, are accounted inevitable." They also referred to Callis, 104, to shew that if an old wall or bank be thrown down by tempest, the commissioners may order another to be erected, even in a different form if necessary.

Burrough, who was to have argued in support of the rule, admitted that the authorities referred to were decisive against him.

LORD KENYON, Ch. J.:

To be sure the law is so; and therefore *we ought not to grant a *certiorari* to remove the proceedings below. The preponder- [*314]

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ance must be very strong against the propriety of an order of commissioners of sewers to induce us to remove it here. It has been frequently said that no *certiorari* ought to be granted to remove a poor rate, lest the poor starve in the mean time. There is almost as strong a reason against removing such an order as the present, lest in the meantime the whole country be inundated.

Per CURIAM:

Rule discharged.

1799. *June* 11.

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THE KING *v.* BENJAMIN FLOWER.

(8 T. R. 314—325.)

The House of Lords having voted the defendant guilty of a breach of privilege in publishing a libel upon a member of their House, and having sentenced him to pay a fine of 100*l*. and to be imprisoned six months and until such fine was paid, which commitment was returned into this Court upon a habeas corpus sued out by the defendant, the Court refused to discharge him out of custody.

THE defendant was this day brought before the Court by virtue of a writ of habeas corpus directed to the keeper of Newgate; who returned the following warrant of commitment by the House of Lords, as the cause of the defendant's imprisonment. "*Die Veneris* 3° *Maij*, 1799. The serjeant at arms acquainted the House that Benjamin Flower had surrendered himself, and was in his custody; whereupon he was ordered to be brought to the bar; and being brought to the bar accordingly, he was informed of the complaint made against him of his having printed and published a libel upon the Right Reverend Richard Lord Bishop of Landaff, a member of this House, in the paper intituled *The Cambridge Intelligencer*, Saturday, April 20th, 1799; and the said paper was shewn to him; and the said Benjamin Flower having been heard as to what he had to say in answer to the said complaint, and having acknowledged himself to be the printer and publisher of the said paper so complained of, and also that he was the sole proprietor of the same, he was directed to withdraw: then the same paper was again read. Moved to resolve by the Lords spiritual and temporal in parliament assembled, that Benjamin Flower, of Cambridge, printer, having presumed to publish a libel on the Right Reverend Richard Lord

Bishop of Landaff, a member of this House, in the paper intituled *The Cambridge Intelligencer*, Saturday, April 20th, 1799, is guilty of a high breach of the privileges of this House; which being objected to, after debate, the question was put thereupon; it was resolved in the affirmative. Moved to resolve by the Lords spiritual and temporal in parliament assembled, that Benjamin Flower, of Cambridge, printer, do for his said offence, pay a fine to his Majesty of 100*l.* and that he be committed prisoner to Newgate for the *space of six months, and until he pay the said fine; the question was put thereupon: it was resolved in the affirmative. Ordered that the serjeant at arms attending this House, his deputy or deputies, do forthwith convey the body of the said Benjamin Flower to the prison of Newgate, to be kept in safe custody for the space of six months, and until he pay the said fine.

"GEO. ROSE, Cler. Parl."

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Clifford moved that the defendant might be discharged, on the ground of the illegality of the warrant of commitment in several respects. First, the House of Lords have no jurisdiction to imprison any one beyond the term of their session: whereas this commitment is for six months absolutely, which may extend beyond that term. Secondly, They have no power to fine. Thirdly, They have no power to punish, either by fine or imprisonment, any commoner; nor an officer of their House for any contempt committed out of the House; such offence being triable by the courts of common law. First, Mr. Justice Blackstone, in his chapter upon commitment and bail,† lays down the position generally, that this Court has power to bail in all cases, except cases of imprisonment, by either House of Parliament, so long as the session lasts. This necessarily excludes the idea of either House having power to imprison beyond that period. In *Fitton's* case,‡ which was the subject of much controversy in the House of Commons, respecting the jurisdiction of the House of Lords to fine and imprison by their own authority in a similar

† 4 Black. Com. 299, 300.

‡ Vid. Hargrave's Preface to Lord Hale's Treatise on the Jurisdiction of the Lords' House of Parliament, 99, &c. 103, &c. Vid. *Mr. Offley's* speech in 1 Grey's Parl. Debates, 103. "The Court" (says he, speaking of the incongruity of contending for the power of the House of Lords to imprison beyond the

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case of libelling a peer, Mr. Solicitor-General *Finch* (afterwards Lord Nottingham) denied the power of the Lords to imprison in any case beyond the session. If the line be not drawn there, an imprisonment under the order of the House of Lords may be extended to an indefinite length of time,† unless this Court interfered. And the same objection would apply to this power as
[*316] was formerly urged by Lord Coke, *to the indefinite power of the Crown to commit by its own authority. Vid. 8 Parliam. Hist. 61. It is of great importance to the subject, that when the House of Lords exceed their jurisdiction by an illegal commitment, this Court should have the power of correcting it by releasing the individual, otherwise there must be a failure of justice. But no permanent mischief can ensue from the exercise of such a power by the Judges of the courts of common law, because in case of their exceeding their authority, they are punishable by impeachment. Secondly, As to the power of the Lords' House to fine, Lord Coke,‡ in the first conference between the two Houses on the petition of right said, that the King could only fine by his Judges in *curiâ*, and not in *camerâ*; which excludes any power of fining in any other body. Such a power could only be derived from the Crown; and it appears fully throughout Lord Hale's Treatise on the Jurisdiction of the House§ of Lords, and Petyt's *Jus Parliamentarium*, that the House of Lords of themselves were never invested with such a juridical power: *coram Rege et Concilio* and *coram Rege in Parliamento* were expressions denoting the power of the Crown exercised through the medium of the council at the House of Lords, in contradistinction to the same power exercised through the medium of the courts of law. Neither can such a power of fining exist with the now acknowledged principle of the constitution, That the House of Lords have no original jurisdiction either civil or

session in any case) "to die, and yet the contempt to last longer than their lordships last," &c. This speech is introduced by Mr. Grey, with an observation, that the arguments used by *Mr. Offley* were the same as had formerly been used by the Solicitor-General *Finch* on the same occasion.

† Vid. *Lord Danby's* case, 2 St. Tr. 759, who being left in custody after the session, was bailed by B. R. to appear in the House of Lords in the next session of Parliament.

‡ Vid. 7th vol. Parliamentary History, 421.

§ Vid. Chap. 1, 2, 3, 4, and 5.

criminal; and there can be no power of fining except by a Court of Record,† whereas the proceeding in question is by the Lords in their legislative, and not in their judicial capacity; for their judicial capacity is confined to cases of error from other courts. In the case of *The King* v. *The Countess of Arundel*,‡ the Journals of the House of Lords are said to be no records: and yet the entry on the Journals can be the only authority for levying the fine on the defendant. Neither does there appear any reason why the Lords House should exercise the power of fining any more than the House of Commons, who do not pretend to any such authority.§ Thirdly, Admitting the power of the Lords as a House of Parliament to commit for contempts committed *in their presence, or for offences committed by their own members or officers as such, yet they have no power to punish a commoner for a common law offence. Here the commitment is not stated to be for a contempt or breach of privilege generally, but specially for a libel upon the Bishop of Landaff, a member of the House. So far back as the 4th year of Edw. III. the House of Peers having sat in judgment upon certain persons, Peers and Commoners, for the murder of Edward the Second; with respect to the latter, the House entered a solemn protest upon the roll that it should not be drawn into a precedent in future; it being stated to be against the law of the land that they should adjudge any others than their peers. Lord Hale‖ in his comment thereon, concludes to the same effect, and observes, that though the case then before them was a judgment of death, yet the tenor of the declaration made by the House is general. The above entry on the Rolls of Parliament has by many been considered as having the authority of a statute;¶ and it was so declared by the Judges on a question put to them by the House of Lords on the impeachment of Sir A. Blair and others, in 1689.†† But the same principle has been abundantly recognized in various Acts of Parliament: 9 Hen. III. st. 1, c. 29; 5 Ed. III. c. 9;

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† *Griesley's* case, 8 Rep. 38, b.; *Beecher's* case, *ib.* 60, b.; *Dr. Bonham's* case, *ib.* 120; *Godfrey's* case, 11 Rep. 43, b.; *Groenvelt* v. *Burwell*, Salk. 200.

‡ Hob. 110.

§ Vid. Hargrave's Preface, 36.

‖ Vide Hale's Jurisdiction of the House of Lords, 91.

¶ 2 Inst. 50, Cotton's Abr. 7 Show. P. C. 125.

†† 14 vol. of the Lords' Journals, 264.

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25 Ed. III. st. 5, c. 4; 28 Ed. III. c. 3; and 42 Ed. III. c. 3: which are referred to in the petition of right, 3 Car. I. The result of all these is, that no person shall be attached by his person, or disseised of his property, but by the judgment of his peers, the law of the land, or by due process of law. Now, the phrase of *per legem terræ* in Magna Charta, was explained by the Judges in the case of *Bridgman* v. *Holt*,† to refer only to such cases as are not triable, *per judicium parium*. The 1 Hen. IV. c. 14, which took away appeals of treason and misdemeanors in Parliament at the suit of private persons, must be taken in a more enlarged sense than what is now understood by appeals; for at that time the House of Lords claimed original cognizance of all cases; and in *Lord Clarendon's* case‡ the word appeal in that statute is stated to mean the same as accusation, from the French word *appeller*. Some instances occurred previous to the Revolution, where the Lords having exercised the power of trying
[*318] Commoners for offences *cognizable by the courts of common law, their jurisdiction was resisted by the House of Commons; and the Lords submitted. In the year 1667, Mr. Fitton§ having been proceeded against before the Lords for a libel on the Lord Gerard, was, on the ground of breach of privilege, fined 500*l.* and ordered to be imprisoned till he should produce one Granger, whose name was to the libel; and was also bound to find sureties for his life: whereupon he petitioned the House of Commons for redress, who, upon the report of a committee to whom the matter was referred, that the question of jurisdiction was fit to be argued at the bar of the House, appointed a day accordingly, and at the same time appointed a committee (amongst whom were the Solicitor-General *Finch*, Serjeant *Maynard*, *Mr. Vaughan*, and *Mr. Prynne*) to inquire into the precedents: but it does not appear what the House finally did upon the matter. The same question, however, arose very soon after, in the case of *Skinner* v. *The East India Company*.|| It is true, that in its inception was an attempt in the House of Lords to exercise original jurisdiction in a civil case, and to give damages by their own

† Vid. Show. P. C. 124; and Hargrave's Preface, 184, 187.

‡ 2 State Trials, 556.

§ Vid. Hargrave's Preface, 99.

|| *Ib.* 103.

authority to the party grieved: but incidentally their criminal jurisdiction came into question; for the Lords having adjudged the East India Company to pay 5,000*l.* as a compensation to Skinner for the injury to his property complained of, the Company presented a petition to the Commons, complaining of the proceedings of the Lords; which petition being acknowledged by Sir Samuel Barnardiston, the Deputy Governor, and others, the Commons appointed a committee of examination, composed of Mr. Solicitor-General *Finch* and all the gentlemen of the long robe, who reported three strong resolutions against the jurisdiction of the Lords; and the same was also denied in the debate by Serjeant *Maynard*, *Sir Robert Atkins*, *Sir Robert Thurland*, afterwards a Baron of the Exchequer, and *Mr. Vaughan*, afterwards the Lord Chief Justice of C. P.; whereupon the Commons committed Skinner for a breach of privilege; and afterwards declared, that whoever should be aiding in the execution of the order of the Lords, should be deemed a betrayer of the rights and liberties of the Commons of England, and an infringer of the privileges of the House of Commons. In return, the Lords voted the petition of Sir John Barnardiston a breach of privilege; and ordered *him to pay a fine of 300*l.* and to be imprisoned till it was [*319] paid. The Parliament was immediately adjourned by order of the King, and before their next meeting, it appeared that an entry had been made in the office of the auditor of the receipt of the Exchequer, as if the fine had been paid by Sir John Barnardiston, which gave an appearance of submission to the sentence of the Lords; but on the next meeting of the Commons, they examined Sir Samuel, and discovered that the whole was a contrivance, he having been liberated without payment of the fine. This shews that the House of Lords were conscious of the illegality of their proceedings, and that they had not the power which they assumed, but wished to lay a foundation for claiming it in future by procuring a false entry to be made of the payment of the fine. The dispute was then put a stop to by the King's prorogation; and finally, both Houses agreed to expunge from their Journals all matters relating to the business between Skinner and the East India Company; so that in the result the Lords abandoned their pretensions. There was another instance

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in 1676, where the House of Lords fined Dr. Carey † 1,000*l.* and committed him till payment, for a contempt in not answering before them as to his knowledge of the writer of a certain pamphlet respecting the long prorogation of the Parliament operating as a dissolution of it. The matter was taken up in the House of Commons, but finally went off under the idea of obtaining better information. The true reason however seems to have been, that the Commons having so lately promised the King to end the dispute with the Lords on the subject of their jurisdiction, were unwilling to take it up again in the instance of a man whose offence was as much a libel upon themselves as on the other House of Parliament. Nothing therefore can be concluded from this. (He also referred to the fourth resolution of the Lords in 1628, relative to the petition of right. Lords' Journals, 25th April, 1628.) Thus the question stood before the Revolution: but for a long period after that event, the practice of the House of Lords affords the strongest argument to shew what was deemed to be the legal and regular course of proceeding in these cases. The first case which occurred was on the publication of a libel on the Trinity; which the Lords ‡ on 3rd January, 1693, voted, should be burnt by the common hangman; and
[*320] ordered that the *Attorney-General* *should prosecute the author according to law. Next came the case of *Bridgman* v. *Holt*,§ where upon a trial at bar in the Court of King's Bench, the Judges refused to seal a bill of exceptions, under some objection to the correctness of the statement in point of fact; on which a petition was presented to the Lords in 1693, complaining of the Judges in that respect: the Judges put in an answer, objecting to the Lords taking cognizance of the complaint, as being in the nature of an original suit, charging them with a crime, "and so altogether improper for the examination of the Lords as not being any more triable by them than every information for breach of any statute law; which matters are by the common law and justice of the land of common right to be tried by a jury." After argument for several days at the bar of the House, the result was, that the parties complaining had leave to withdraw

† Vid. Hargrave's Preface, 161, and 4 Grey's Parl. Deb. 165 to 173.

‡ 15 vol. Lords' Journals, 332.

§ Vid. Hargrave's Preface, 184.

their petition. This was in effect a complete abandonment of that claim of jurisdiction by the Lords. On the authority of that precedent the Lords continued to act down to 1764; of which several instances occur in their Journals. In 1702† Dr. Drake's History of the last Parliament was voted a libel; and the *Attorney-General* ordered to prosecute the author. In 1707,‡ Remarks on Dr. Friend's Account of Lord Peterborough's Conduct in Spain, &c. published by Mr. Kingston, was voted a libel; and the *Attorney-General* ordered to prosecute the publisher; but Kingston himself was discharged by the Lords. In 1719,§ Hall's Sober Reply, &c. was voted blasphemous, and ordered to be burned by the common hangman; and the *Attorney-General* ordered to prosecute; but the author was afterwards discharged on entering into recognizance to appear in the Court of King's Bench the first day of the next Term, to answer such information as might be exhibited against him. In 1720,‖ a paper was voted a libel on the poor Protestants in the Palatinate, and upon the conduct of his Majesty and the other Protestant powers in their favour; on which it was ordered that the King be addressed to direct a prosecution against the author, printer, and publisher. In 1740, a motion having been made in the House of Lords to remove Sir Robert Walpole from his office, which was negatived, the House resolved, that any attempt to punish an individual *without hearing him in his defence, &c. was against the law of [*321] Parliament, &c.; and though a protest signed by thirty-one Lords was entered to that resolution, yet they did not deny the truth of the proposition, but only the application of it.¶ In 1750,†† the House voted a paper intituled "Constitutional Queries," &c. to be a libel on the King, laws, and constitution; and after a conference with the Commons on the subject, addressed the King to give orders for discovering the author and publisher, and bringing them to condign punishment. In 1763,‡‡ "The Essay on Woman," which was published with the name of Dr. Warburton, a member of the House, affixed, was voted a

† 17 vol. of Lords' Journals, 122, 3.
‡ *Ib.* 18 vol. 430.
§ *Ib.* 11 vol. 231, 242.
‖ *Ib.* 344.
¶ Vid. Commons' Jour. 13th Feb. 1740, and 3 vol. of the Collection of King's Speeches and Lords' Protests, p. 385.
†† 27 vol. 478.
‡‡ 30 vol. 415, 420.

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libel and a breach of privilege; yet, after receiving proofs that Mr. Wilkes was the author, the Lords only addressed the King to direct a prosecution. That case is in all respects like the present. In the same year† "The North Briton, No. 45," another publication of Mr. Wilkes, was voted a libel by the Lords; and on a conference between the two Houses, the result was, to order it to be burned, and to address the King to direct a prosecution against the author. A similar proceeding took place in 1764. As to all the cases since that period where the House of Lords have exercised the jurisdiction now complained of, they have been cases submitted to by the parties, and are not therefore entitled to the same weight as those cases where the parties having resisted the House, have acquiesced. It is true, that for contempts committed before either House of Parliament, or by its members or officers as such, they have a power of committing, as was said by Lord Chief Justice DE GREY in *Brass Crosby's* case,‡ the reason of which is there truly given by him, that contempts can only be punished by the court of jurisdiction before which they are committed, or by some superior Court; and therefore as there is no Court superior to the Houses of Parliament, it follows, That in order to protect their authority, they must have the power to commit in such cases. But that does not apply to a case like the present, where it appears upon the face of the warrant returned, that the party was committed for a common law offence, for which he is punishable by the ordinary Courts. In the Act of the 16th Car. I. c. 10, for abolishing the Court of Star-chamber, one of the reasons stated is, That all

[*322] matters examinable *before them, may have their proper remedy and redress, and their due punishment and correction by the common law of the land, and in the ordinary course of justice elsewhere. In *Lord Shaftesbury's* case,§ it was taken for granted that the House of Lords could not commit even one of their own members for a contempt committed out of the House; and that case was distinguished from others, because he was a member, and the contempt was committed in the face of the House. It is not enough in this case for the Court to refuse to

† *Ib.* 425.
‡ 3 Wils. 198.
§ 2 St. Tr. 615.

give relief merely because the House have voted this a breach of privilege; for if that were so, they might extend their jurisdiction over every offence, by voting it a breach of privilege: and in 1704, pending the proceedings in Parliament on the case of *Ashby* v. *White*, the Lords came to a resolution,† that neither House of Parliament had a power to create new privileges to themselves, not warranted by the known laws and customs of Parliament. Now here is an attempt to convert a common law offence into a breach of privilege. If this were to prevail, great injustice might ensue; for the punishment inflicted by the House will be no bar to a prosecution for the same offence at common law; and thus the defendant may be punished twice for the same offence, which is contrary to law and justice, and the principles of the constitution. Or it may happen, that on a trial upon an information or indictment for the same offence, the defendant may be acquitted by a jury of the country; and thus there would be two contradictory judgments on the same subject; or if convicted and the record removed by error into the Upper House, the same jurisdiction by which the defendant had been before punished, would have either to pronounce a contradictory judgment by declaring that the same writing set out on the record was no libel which they had before adjudged to be a libel, or they would have to confirm the conviction and judgment, and thus by their own authority, adjudge the defendant to suffer a second punishment for the same offence; in either event, the appeal would be to the same court of error, which had pre-judged the cause: a thing unheard of in our jurisprudence. The mode of proceeding also in this summary manner is highly unjust: the defendant had no opportunity of making his full defence to the charge, or of calling any witnesses in that behalf; but on the mere acknowledgment by him that he was the printer and publisher of the newspaper, in which *the paragraph [*323] complained of was contained, he was convicted of the whole charge: whereas the mere printing or publishing a paper does not subject the party to conviction and punishment as for publishing a libel, unless it be found that he published it with a libellous intent: a fact peculiarly proper for the decision of a jury.

† 17 vol. of Lords' Journals, 698, &c. 703.

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LORD KENYON, Ch. J.:

If we entertained any doubts on this subject, it would be unbecoming in us to rush to a speedy decision, without looking through all the cases cited by the defendant's counsel: but not having any doubts, I think it best to dispose of the case at once. The cases that have been referred to are all collected in Lord Hale's Treatise on the Jurisdiction of the Lords' House of Parliament, and that valuable preface to it, published by Mr. Hargrave; but in the whole of that publication, the defendant's counsel has not found one case applicable to the present. This is one of the plainest questions that ever was discussed in a court of law. Some things, however, have dropped from the learned counsel that require an answer: First, It is said that the House of Lords is not a court of record. That the House of Lords when exercising a legislative capacity is not a court of record, is undoubtedly true; but when sitting in a judicial capacity, as in the present case, it is a court of record. Then it was objected, that the defendant was condemned without being heard in his defence; but the warrant of commitment furnishes an answer to that: by that it appears that "He was informed of the complaint made against him," &c.; and having been heard as to what he had to say, in answer to the said complaint, &c. he was adjudged "guilty of a high breach of the privileges of the House," &c.; so that it clearly appears that he was heard in his defence, and had the same opportunity of calling witnesses that every other defendant has in a court of justice. Then insinuations are thrown out against the encroachments by the House of Lords on the liberties of the subject; but the good subjects of this country feel themselves protected in their liberties by both Houses of Parliament. Government rests in a great degree on public opinion; and if ever the time shall come when factious men will overturn the government of the country, they will begin their work by calumniating the courts of justice and both Houses of Parliament. The ground of this proceeding is, That the defendant has been guilty of a breach of the privileges of the House, and a contempt of the House. This claim of right to punish by fine and imprisonment for such an offence, is not peculiar to the House of Lords; it is frequently exercised by this

and other courts of record, and that *not merely for contempts committed in the presence of the Court; one instance of which was that of Mr. Beardmore,† under-sheriff of Middlesex, for a contempt of the Court in not executing part of the sentence pronounced on Dr. Shebbeare; and that case answers another objection, strongly insisted upon by the defendant's counsel here, That if the party accused can be punished in any other manner, this mode of trial and punishment cannot be resorted to; for there Mr. Beardmore might have been indicted; but yet he was attached, examined upon interrogatories, and fined and imprisoned. Again: it is objected, that the House of Lords cannot impose a fine for such an offence: but this and other courts of record have the power of fining in this summary manner; and why should not the House of Lords have the same power of imposing a fine for a contempt of their privileges? Then several instances were alluded to, where the House did not choose to exercise this privilege, but directed prosecutions to be instituted in the courts of law. The same observation might equally be made on the proceedings of this Court, who have sometimes directed indictments to be preferred: we are not therefore to conclude that the House of Lords has not the power of inflicting this punishment, from the circumstance of its not exercising it on all occasions. When *Lord Shaftesbury's* case came on, there were some persons who wished to abridge the privileges of the House of Lords: but Mr. Serjt. *Maynard* was one of those who argued in support of their privileges; and he surely was not capable of concurring in any attempt to infringe the liberties of the people. It has been said however, that though many instances are to be found, in which the House of Lords has in point of fact exercised this power, whenever that power has been resisted, it has been resisted with effect; from whence it is inferred, that the House of Lords has not the authority which it assumes: but in this case I may avail myself of the same argument in favour of its jurisdiction; for no case has been found where it has been holden to be illegal in the House of Lords, to fine and imprison a person guilty of a breach of privilege. We were bound to grant this habeas corpus: but

† Vid. 2 Burr. 792.

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having seen the return to it, we are bound to remand the defendant to prison, because the subject belongs *ad aliud examen*. There is nothing unconstitutional in the House of Lords proceeding in this mode for a breach of privilege; and unless we wish to assist in the attempt that is made to overset the law of Parliament and the constitution, we must remand the defendant.

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GROSE, J.:

This question is not new; it has frequently been considered in courts of law; and the principles discussed to-day, and the cases cited, were examined not many years ago; and the result is very ably stated by Lord Ch. J. DE GREY, in 3 Wils. 199, "When the House of Commons (and the same may be said of the House of Lords) adjudge anything to be a contempt or breach of privilege, their adjudication is a conviction; and their commitment in consequence is execution: and no Court can discharge or bail a person that is in execution by the judgment of any other Court." In another passage, he said, "Every Court must be sole judge of its own contempts;" and again, "The counsel at the bar have not cited one case where any Court of this Hall ever determined a matter of privilege which did not come incidentally before them." Having stated this, I think I need not add more in the present case.

Per CURIAM: *

Let the defendant be remanded.

Note.—As a clue to later cases relating to parliamentary privilege, see *Bradlaugh* v. *Gossett* (1884) 12 Q. B. D. 271, 53 L. J. Q. B. 209. But observe that the decision in *Bradlaugh* v. *Gossett* required a less extensive application of the authority of Parliament; the question relating exclusively to the enforcement of an order of the House (of Commons) within the walls of the House itself.—R. C.

* Mr. J. LAWRENCE was not in court, being indisposed; and Mr. J. LE BLANC having attended at the Guildhall sittings for Lord KENYON, and not returning until the argument was closed, gave no opinion.

K. B. MICHAELMAS TERM.

DAWES *v.* PECK.

(8 T. R. 330—334.)

1799.
Nov. 11.

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If the consignor of goods deliver them to a particular carrier, by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods; the action can only be brought by the consignee.†

This was an action on the case, by the consignor of goods against the defendant, a common carrier, for not safely carrying, according to his undertaking, in consideration of a certain hire and reward to be therefor paid, two casks of gin from London to one Thomas Odey, at Hillmorton, in Warwickshire, within the time limited by two excise permits; in consequence of which the casks of gin became forfeited to the Crown, and were seized. This case came on to be tried at the sittings in London, after last Easter Term, when the plaintiff proved his case, by shewing the delivery of the casks to a person employed by the defendant at the usual place, where they were booked, to be sent by the defendant's waggon, and the usual price paid for booking by the plaintiff's servant. The casks were directed to "Mr. Odey, Hillmorton, near Rugby, Warwickshire, by Peck's waggon." It appeared that they were afterwards sent by the waggon, and were left at the Crown Inn, at West Haddon, which was the nearest place to Hillmorton in the road which the waggon travelled; and where, after lying some time, they were seized, in consequence of the time mentioned in the permit for their removal *being expired. The merits of the case, as between the plaintiff and Odey the consignee, or in respect of the legality of the seizure, were not entered into; but the defendant's counsel, in opening his cause to the jury, read a letter from the plaintiff to Odey, after the seizure was known, in which he said, That the liquors sent "were, in quantity and prices, exactly conformable to your

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† Compare *G. W. Ry. Co.* v. *Bagge* (1885) 15 Q. B. D. 625, 54 L. J. Q. B. 599, where the consignor had agreed with the consignee to pay the carriage, and was held liable for it in an action by the carrier.—R. C.

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(Odey's) order: but by what authority they were left at the Crown Inn, at West Haddon, remains for the innkeeper or carrier to explain or account for. All I have to observe is this: That the goods having been sent conformably to your orders, and by the carrier you directed, I shall certainly look to you for their amount, &c. Upon reading this letter, which was admitted to be genuine, Lord KENYON was of opinion, that the action by the present plaintiff could not be supported; for that the legal right to the goods after such delivery, was vested in the consignee, to whom alone the carrier was answerable, if at all; and therefore the plaintiff was nonsuited.

A new trial was moved for in Trinity Term last; and a rule *nisi* for setting aside the nonsuit was obtained, which stood over till this Term; and now

Erskine and *Raine* shewed cause against the rule:

A delivery of goods to a carrier, named by the consignee, as in this case, is tantamount to a delivery to the consignee himself, and divests the consignor of the legal property in them, though he still retains an equitable right of stopping them while *in transitu*, in case of the failure of the consignee. After such a delivery, the property in these goods was altered, and the goods were at the risk of the consignee: and so it was considered by the plaintiff himself, as appears by his letter to Odey; consequently, the plaintiff can maintain no action for any loss or injury which happened to them after they became the property of another. In the cases of *Davis* v. *James*,† and *Moore* v. *Wilson*,‡ the ground of the decisions, that the consignors might maintain the action, was that they had made themselves responsible to the carriers for the price of the carriage. In the former of those Lord MANSFIELD said, That there was no question in the case as to the vesting of the property; for the action was founded on the agreement between the carrier and the plaintiffs, who were to pay him: but there is nothing in this case from
[*332] which any property in the plaintiff can be inferred *whereon to found his action, because his own letter shews that he had renounced all property in the goods.

† 5 Burr. 2680. ‡ 1 T. R. 659; 1 R. R. 347.

Garrow and *Yates*, *contrà*:

It does not follow, that because the consignee may maintain an action against a carrier for the loss of goods, the consignor may not also have his remedy. The cases shew that the action may be maintained by either. The reason of the thing is more in favour of the action by the consignor, for there is a privity of contract between him and the carrier; but there is no such privity between the latter and the consignee. Here too the booking was paid for by the consignor: which is evidence of a contract between him and the carrier. The carrier is ignorant of the particular agreement between the consignor and the consignee; and, at all events, the consignor is liable to the carrier for the price of the carriage, if the consignee do not accept the goods. *Davis* v. *James*, 5 Burr. 2680. The liability of the consignor to the carrier is a sufficient ground to maintain this action. Both the case in 5 Burr. and that of *Moore* v. *Wilson* proceeded on the admission that the legal property passed to the vendee by the delivery to the carrier. All the cases of stopping *in transitu* shew that until a delivery in fact to the consignee, a latent right to the goods remains in the vendor, even as against the vendee; but whatever the question may be as between those, it ought not to be permitted to the carrier to dispute the property of the person from whom he received the goods.

LORD KENYON, Ch. J.:

I cannot subscribe to one part of the argument urged on behalf of the plaintiff, namely, that the right of property on which this action is founded is to fluctuate, according to the choice of the consignor or consignee; and that consequently either of them may, at his pleasure, maintain an action against the carrier for the non-delivery of the goods. In my opinion, the legal rights of the parties must be certain, and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration in whom the legal right was vested; for he is the person who has sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss, is the proper party to call for compensation from the person by whom he has been injured.

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The facts are these:—A man in Warwickshire *gave an order for goods from London, which he directed to be sent by a certain carrier; and the dealer in London delivered them accordingly to that carrier, to be conveyed to the vendee. Upon this short statement there can be no doubt but that, after such a delivery, the vendee must stand to the risk. Then here the *damnum et injuria* are to him, and not to the vendor, the plaintiff. I do not find that any thing which I have advanced is broken in upon by the two cases which have been relied upon in the argument: the distinction which is there taken I fully adopt. In the one case, the action brought by the consignor against the carrier was sustained, because the consignor was to be answerable for the price of the carriage; he stood, therefore, in the character of an insurer to the consignee, for the safe arrival of the goods; and the subsequent case of *Moore* v. *Wilson* proceeded on the same ground. It is not disputed but that the consignee might have maintained the action in this case: then if the consignee had recovered a verdict against the carrier, How could such recovery by a stranger have been pleaded in bar to this action? And if it could not, and yet this action could be maintained, the consequence would be, that the carrier would be liable to answer in damages to both for the same loss. Therefore common sense and justice, as well as strict law, are in favour of the objection made against the plaintiff's recovering in this action.

GROSE, J.:

The plaintiff, who was at one time the owner of these goods, delivered them, by the order of Odey, to the defendant, a common carrier, for the purpose of having them conveyed to Odey. By such delivery they became the property of Odey; he was liable to be sued for the value of them; and it is admitted that he might have maintained an action for any loss or injury happening to them by the default of the defendant. It is true that, while the goods remained in the hands of the carrier, there was a latent right in the plaintiff to stop them *in transitu*: but that is in its nature an equitable right, though not grown into law; but the legal right was, by the delivery to the carrier, vested in the consignee, by whose order they were so delivered. But cases

have been cited wherein it was holden, that the consignor might maintain the action: on looking into them, however, it appears that they proceeded on the ground of special agreements between the respective consignors and carriers. Now here there was no evidence of any such agreement; and the letter from the plaintiff to Odey excludes the *idea of any such agreement; for the [*334] former therein insists, that the property was vested in the consignee, whom he considered as at all events answerable to him for the value. Then after it appears that the plaintiff had renounced all right and property in the goods at the time, upon what ground can he claim an indemnity for the loss of what belonged to another? I am therefore of opinion, that the action against the carrier ought to have been brought by the consignee of the goods, in whom the property was vested by the delivery to the carrier, according to his own order.

LAWRENCE, J.:

Some stress has been laid on the circumstance of the consignor having paid the carrier for booking the goods, as evidence of a special contract between them, in order to bring this case within those which were cited at the bar; but that circumstance would not give a right of action against the carrier, to recover damage for the loss of the goods, if it appeared that they were the property of another person: and here it is admitted that the action might have been brought by the consignee in right of his property in them. It is true that in some special cases a man may make himself liable to either of two persons, on account of the same interest: but that is not usual; and it is more consonant to the general principle of law to refer all transactions of agents to the principal, on whose account they were entered into. Now here I consider that what was done by the consignor in respect of the booking, was as the agent of the consignee, at whose risk the goods were sent; and, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom the goods are directed, and to whom he looks for the price of the carriage upon delivery.

LE BLANC, J.:

It is admitted that the legal property of the goods was, by the

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delivery to the carrier, vested in the consignee, and that he might maintain the action: and upon examination of the cases referred to in support of the consignor's right of action, it appears that they proceeded upon the ground of a special agreement between the parties, that the consignor was to pay for the carriage of the goods. But, as there was no evidence of any such agreement in this case, I think that the nonsuit was proper.

Rule discharged.

1799. *Nov.* 12.

[335]

JENNINGS *v.* RUNDALL.

(8 T. R. 335—338.)

A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant; therefore where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c. wrongfully and injuriously rode the mare, so that she was damaged, &c. it was holden that the defendant might plead his infancy in bar, the action being founded on a contract.*

THE first count in this declaration stated, that the plaintiff on, &c. at the instance and request of the defendant, delivered to the defendant a certain mare of the plaintiff to be moderately ridden by the defendant; yet that the defendant, contriving and maliciously intending to injure the plaintiff, whilst the mare was in the defendant's custody under such delivery, and before the same was returned to the plaintiff on, &c. wrongfully and injuriously rode, used, and worked the said mare in so immoderate, excessive, and improper a manner, and took so little and such bad care thereof, that, by reason of such immoderate, &c. riding, &c. the said mare became, and was greatly strained, damaged, &c. In the second count it was alleged that the plaintiff, at the instance and request of the defendant, let to hire, and delivered to the defendant, a certain other mare, to go and perform a certain reasonable and moderate journey, &c. yet that

* Compare and distinguish the cases of *Burnard* v. *Haggis* (C. P. (1863) 14 C. B. N. S. 45, 32 L. J. C. P. 189; and *Walley* v. *Holt* (Ex. D. 1876) 35 L. T. 631; in both of which cases the infant was held liable, the wrongful act in these cases being of a wholly unauthorized kind, and such as to determine the bailment and constitute an independent trespass.—R. C.

the defendant contriving, &c. wrongfully and injuriously rode and worked the said mare a much longer journey, &c. There was also a count in trover for two mares.

The defendant pleaded his infancy to the two first counts; to which plea the plaintiff demurred.

Marryat in support of the demurrer (after observing that it was immaterial whether or not infancy could be pleaded to the second count, because, it being pleaded to both counts, if it were a bad plea as to either count, the whole plea was bad) contended that, as the first count was not founded on a contract but on a tort, the defendant could not plead infancy to it. That that count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her, or to re-deliver her: but that it appears to be a delivery on bail to the defendant, who had abused the plaintiff's property. That the tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant. That the *dictum* in the books, That if the action arise out of the contract, the plaintiff shall not, by declaring in tort, prevent the defendant pleading infancy, must be confined to cases where the wrong complained of consists in omission, or in some act which is a tort only by construction of law. * * *

Wood, contrà, was stopped by the Court. [336]

LORD KENYON, Ch. J.:

The law of England has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to shew the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened,* the mare being strained: and the question is, Whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that which arises out of a

* It does not appear from the report how the state of facts was inferred. The second count might have been so framed as to raise the point on which the later cases were decided, but it was not; the plaintiff's own counsel had treated it as immaterial.—R. C.

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contract into a tort, there would be an end of that protection which the law affords to infants. Lord MANSFIELD, indeed, frequently said, that this protection was to be used as a shield, [*337] *and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words "wrongfully, injuriously, and maliciously," introduced into this declaration, cannot vary the case.

GROSE, J.:

I am of the same opinion. In the case of *Manby* v. *Scott*,† this distinction was taken, that if the action against an infant be grounded on a contract, the plaintiff shall not convert it into a tort; "If one deliver goods to an infant on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that means all infants in England would be ruined." A very few years after the decision of that case, the case of *Johnson* v. *Pye* ‡ arose, according to one report of which Lord Ch. J. KEELING expressed great indignation at the attempt to charge an infant in tort, for that which was the foundation of an action of *assumpsit*; he said "The judgment will stay for ever, else the whole foundation of the common law will be shaken; for this was but a slip; and he might have pleaded his minority here."

LAWRENCE, J.:

The true distinction is that mentioned by my brother GROSE, and not that stated at the bar, between negligence and an act done by the infant. It is argued, that if no act be done by the infant, he may plead his infancy; but that infancy is not a defence where an act has been done: if that were so, an infant would not be liable in many instances of trover, where the conversion consists merely in a non-delivery; and yet in trover an infant is always liable. According to the same rule, if an action were brought against an infant for negligently keeping

† 1 Sid. 129.

‡ 1 Keb. 905; and 1 Lev. 169.

the plaintiff's cattle, by which they died, infancy might be pleaded in bar; but if the declaration charged the defendant with having given the cattle bad food, by which they died, it could not. But this certainly is not the true distinction.

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LE BLANC, J.:

The plea of infancy is a good bar to this action, on the ground that the act done in this case is the foundation of an action of *assumpsit*. And the reason of the distinction taken in the case in Siderfin is, That the plaintiff shall not by changing the form of the action, vary the liability of the infant. *Now if the plaintiff could not have maintained an action of *assumpsit* against the infant, neither can he maintain the action in its present form. On this short ground, therefore, I think that the plea of infancy is a good defence to this action.

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Judgment for the defendant.

THE KING *v.* THE COMPANY OF PROPRIETORS OF THE STAFFORDSHIRE AND WORCESTERSHIRE CANAL NAVIGATION.†

1799. *Nov.* 13.

[340]

(8 T. R. 340—351.)

A navigation act empowered the proprietors to take so much per mile per ton, for all goods carried along the canal; held that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, where the respective voyages finished; though for their own convenience, they were authorized to collect the tolls where they pleased, and did in fact collect them in other parishes.

THE defendants appealed to the Quarter Sessions for the county of Worcester, against a rate made in December last, for

† It should be observed that this case, and the cases of *R.* v. *Aire*, &c., and *R.* v. *Pape*, referred to (and already reported 1 R. R. 579 and 2 R. R. 454), belong rather to the history than to the present law and practice of rating. The point of view from which such questions are considered, has been changed: 1st, by the determination (contrary to what is assumed in the above-mentioned cases) that tolls are not *per se* rateable (*R.* v. *Nicholson*, 12 East, 330; *Williams* v. *Jones*, *ibid.* 346; *R.* v. *Leicester*, 6 M. & S. 400; see also *R.* v. *Kingswinford*, 7 B. & C. 236): 2dly, by alterations in the form of the special Acts: 3rdly, by the Act to regulate parochial assessments, 6 & 7 W. IV. c. 96. —R. C.

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the relief of the poor of the chapelry or hamlet of Lower Mitton, in the parish of Kidderminster, in the county of Worcester, whereby they were rated for "their basins, towing-paths, and that part of their canal and the locks lying within Lower Mitton, and for the tolls and duties arising therefrom due at Lower Mitton on 1,500*l.* at the sum of 75*l.* for their lands, wharfs, cranes, weighing-machines, and timber-yards in their own possession on 12*l.* at the sum of 12*s.* and for part of Jones's land also in their own possession on 2*l.* 10*s.* 0*d.* at the sum of 2*s.* 6*d.*" On hearing the appeal, the sessions confirmed the rate on the Company for their lands, wharfs, cranes, weighing-machines, and timber yards in their own possession, on 12*l.* at 12*s.* and for part of Jones's land also in their possession, on 2*l.* 10*s.* 0*d.* at 2*s.* 6*d.* without

[*341] opposition. The Court also confirmed *the rate on the Company for their basins, towing-paths, and that part of their canal and the locks lying within Lower Mitton, and for the tolls and duties arising therefrom due at Lower Mitton, on 1,500*l.* at 75*l.* in manner following, viz. they confirmed the rate of 75*l.* upon the said 1,500*l.* so far as respects 350*l.* (part of the sum of 10,000*l.* after-mentioned) payable for and in respect of the lock-duties, on passing through the locks lying within Lower Mitton, hereinafter described, without opposition; and they also confirmed the rate of 75*l.* upon the said 1,500*l.* so far as respects the residue of the said 10,000*l.* after-mentioned, payable for and in respect of the tolls and duties due at Lower Mitton, hereinafter also described, subject to the opinion of this Court, as to this last charge, on the following case:

The rate was duly allowed and published. By an Act of the 6th of Geo. III. the Company are empowered to take rates and duties for tonnage and wharfage for all goods conveyed on the canal, not exceeding 1½*d.* per mile for every ton, and so in proportion for any greater or less quantity than a ton; which rates and duties are directed by the Act to be paid to such persons, at such places near the canal, in such manner, and under such regulations as the Company shall appoint; with a power of distress, in case of non-payment. It is further enacted, that for the more easy collecting of the rates and duties, the master, &c. of every vessel navigating on the canal, shall give a just account,

in writing, signed by him, to the collectors of the tonnage or duties, at the places where they attend for that purpose, of the quantities of goods in such vessel, from whence brought, and where they intend to land the same; and if such goods be liable to pay different tolls, then such master, &c. shall specify the quantities liable to the payment of each toll; and in case they neglect or refuse to give such account, or give a false account, or deliver any part of their loading at any other place than is mentioned in that account, they are to forfeit to the Company 10*s.* for every ton of goods so falsely accounted for, &c. over and above the respective rates and duties payable for the same and recoverable in the same manner, &c. By another Act of the 10th Geo. III. the Company are authorized to take tonnage proportionably for any less distance than a mile which any commodities shall be conveyed on the canal, to be collected, recovered, and applied as the former tonnage rates; and the vessels, &c. passing through the two locks erected between the *river Severn and the canal basin, are to pay a canal or lock-due [*342] at the rate of 1*d.* per ton, in lieu of the damage of 1½*d.* per mile fixed by the said recited Act; and the said tolls or lock-dues are to be collected, recovered, and applied as before directed, &c. By the same Act of the 10th Geo. III. it is enacted, that the shares of the Company, which, by the former Act, the proprietors held in the nature of real estates, shall be deemed personal estates, &c. The lock-dues received by the Company in the last year for boats and other vessels passing through the said two locks, which locks are locally situated in the hamlet of Lower Mitton, amounted to 350*l.* The tonnage of the goods brought in boats down the canal, and landed at Stourport, which is in the hamlet of Lower Mitton, and the termination of the canal, or trans-shipped therefrom on board canal boats to Severn barges, amounted in the year 1798 to 9,650*l.* making together with the said 350*l.* the sum of 10,000*l.*; which sum of 9,650*l.* arose in the following manner, viz. (Here the case set forth the different sums received for the tonnage of goods taken in at different places on the canal, shewing how much the tonnage amounted to in each parish, reckoning by the number of miles that the canal passed in the several parishes; according to which mode

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of calculation, by the mile, a very small part of the toll arose in Lower Mitton.) But the said sum of 9,650*l.* was not received by the Company at Lower Mitton, but at the several places where the goods were shipped. The expenses of repairing the basin and that part of the canal which lies within the hamlet, amount annually to 540*l.* Other parts of the canal and basins lying out of the hamlet are also repaired at a great annual expense; and the repair of every part contributes to the profits and use of the whole canal. The dividends per share of each proprietor of the canal for the year 1798, amounted to 32*l.* clear of all expenses and deductions. The agents of the Company, on receiving accounts, in writing, of the quantities of goods which are in each vessel, and of the places where the same are intended to be landed, in the manner required by the first Act, deliver permits to the master, &c. of every such vessel, &c. to navigate the same accordingly upon the canal. The Company are not carriers upon the canal, nor the owners of any of the vessels employed thereon; and the payment of the tolls on goods carried on the canal is, by the direction of the Company, made to their agents at the places where such goods are laden or shipped; and the Company consider such places as the places
[*343] at which *they become due under the Act. The land used in the canal, the towing paths, and basins lying in the hamlet of Lower Mitton, measure 8*a.* 2*r.* 13*p.*; and the lands used in the whole of the canal, towing-path, and basin, measure 370*a.* 2*r.* 7¾*p.* The length of the whole canal is 46 miles and an half, amounting to 81,840 yards; 1,367 yards of which, including the length of the basin, and measuring to the Severn lock, being the termination of the canal, lie in the hamlet of Lower Mitton; so that that part of the canal which lies within the hamlet, bears to the whole length of the canal the proportion of about one to sixty.

Erskine, *Manley*, and *Jervis*, in support of the order of sessions [relied chiefly upon *R.* v. *Aire and Calder Navigation*, 2 T. R. 660, 1 R. R. 579; and *R.* v. *Page*, 4 T. R. 543, and 2 R. R. 454].

[345] *Law*, *Gibbs*, *Caldecot*, *Touchet*, and *Ryder*, *contrà*. * * *

LORD KENYON, Ch. J.:

I consider that this case is brought forward to give us an opportunity of reviewing the opinions we delivered in the former cases that have been alluded to: but on reconsideration, I do not see any reason to induce me to change the opinion I then gave. In the first of those, *R.* v. *The Undertakers of the Aire and Calder Navigation*, which was decided soon after I came into this Court, though it differs from the present case, some rules were established applicable to this case. But I cannot distinguish the other case, *R.* v. *Page*, from the present in principle and in substance, though there are some nice distinctions between them; and if the rules there laid down had occasioned any great inconvenience, the parties interested have had in the interval of several years many opportunities to apply to the Legislature for a remedy: but no application of that kind having been made, I presume that no inconvenience has resulted from those determinations. This does not appear to be a contest between the parishes through which the canal passes and the Company of Proprietors, but the Company are struggling against the rate altogether. To this Company indeed as well as to others of the same kind, the public are much indebted for their undertakings; but they ought to contribute to the relief of the poor in common with the owners of all other species of property in proportion to the profits that they acquire. As the Company have objected to the present mode of rating, I am anxious to know what other mode they would substitute for it: on this point however their counsel have left me in great doubt. They give me the choice of two modes; they wish the Company either to be rated for the whole in the parish where the tolls are received, or for the different parts in the different parishes through which the canal passes, in proportion to the number of miles in each parish; but they have not named that mode on which they choose to rely. I rather think that they would not be satisfied with the first of those methods; because, after receiving the tolls in one parish for the whole voyage, it is too much to say that the Company should retain them in the event of the owners of vessels not being able to go the whole voyage either on account of the locks being out of repair, the banks giving way, or any other accident

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of that *kind. It is not therefore the most convenient place to rate the tolls where they are collected. Then it is said that the other mode of rating should be adopted, because the land over which the canal passes was before rateable to the poor, in respect of its produce. But insuperable difficulties occur to this mode. It is admitted that all property should be rated to the poor according to its meliorated state: but on account of the difference of expense attending the cutting of a canal in flat and hilly countries, it is almost impossible to ascertain the precise degree in which the property is meliorated in each particular parish.

The Bar are already in possession of the reasons which we gave in the case of *R.* v. *Page*, and therefore it is not necessary to repeat them. It seems to me, after reviewing the whole of the subject, and considering which is the most eligible mode of rating the property in question, that the mode adopted below is that which approaches nearest to justice. It is sufficient therefore to say, that I continue to think that the case of *R.* v. *Page* was rightly decided; and as I cannot distinguish this case from that in principle, the present rate must be confirmed.

GROSE, J.:

The great object in this case is, To find out the true principle according to which the tolls ought to be rated. This very point was much considered in the case, *R.* v. *Page*, where, after the best consideration that I could give to the subject, it appears to me, that tolls of this kind should be rated where they become due; and I cannot, on consideration, discover any other mode of rating less exceptionable than that. That mode may possibly be liable to some objection, and so is every other mode that has been suggested; but that mode appears to be most consistent with the justice of the case, and to be attended with fewer difficulties and objections than any other; and it is not inconsistent with any clause in the Act of Parliament by which the tolls are imposed. The Lord Chief Justice has stated his objections to both the modes of rating proposed by the Company; and I entirely agree with his Lordship on those points. In answer to one argument at the Bar, that the money was not paid for the tonnage, but for the permit to pass on the navigation, it is sufficient to refer to

the Act of Parliament which empowers the Company to take for tonnage for all goods conveyed on the canal such rates and duties, &c. not exceeding 1½*d.* per mile for every ton: the rates therefore are not payable until the goods are conveyed, for until they are conveyed, it is impossible to say how much will become due; for *though the money may be paid in advance for the convenience of the Company, in many instances it must be returned if the voyage cannot be completed, because until the voyage is completed, no money becomes due under the Act of Parliament. On the whole, therefore, I think that the mode of rating adopted in the case of *R.* v. *Page*, which seems less objectionable than any other, ought to be adopted in the present case.

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LAWRENCE, J.:

The Company, who object to the present mode of rating, say that they should be rated for the tolls either in the parish where they are collected, or in the several parishes through which the canal passes, according to the distance in each. Their counsel would not absolutely choose the first; they seemed rather to prefer the latter mode. But considering that this is a rate on tolls, the proprietors of the tolls must be rated either in the parish where the tolls become due, or in that where they are received; but I think they cannot be rated in the parish where they are actually collected, because many cases may be put in which the tolls, though received, must be returned to the owners of the goods; therefore it seems to me that the tolls should be rated in the parish where they become due, that is, Where the voyage is complete; and what was said by Mr. J. BULLER in giving his opinion in *R.* v. *Page*, comparing this to the case of a carrier, deserves great weight. But it has been argued that this resembles the case of *R.* v. *Cardington*,† where the tolls became due on passing the sluice: but it must be remembered, that there the toll was paid for the use of the lock; and if the owner of the vessel, after paying the toll, had been prevented pursuing his voyage, he could never have recovered back his money, because he had had the use of the lock. Nor is this like the case of a turnpike: for there the tolls are paid for the benefit of the

† Cowp. 81.

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public, and not for the use of any individuals; and those tolls are not the subject of taxation within the Statute of 43 Elizabeth; there also the money is paid for the privilege of passing through the gate; and the party having once paid it, cannot under any circumstances recover it back again. It seems to me, therefore, that this question was very rightly settled in *R.* v. *Page*; which case cannot fairly be distinguished from the present.

LE BLANC, J.:

This is a rate on tolls, and not on land. It is admitted that tolls, as such, are rateable property, and that such property is
[*351] rateable in the parish where it arises; now it was *decided in *R.* v. *Cardington*, and in other cases, that by this expression, "where it arises," we are not to understand the parish where the tolls are actually received, but the parish where they become due. The question then in this case is, Where do these tolls become due or payable? It has been said that the tolls are not paid to the Company in respect of a contract for the carriage of goods, but for the privilege or liberty of carrying goods on their navigation: but, in each instance, it is an entire contract to pay so much for the liberty of carrying goods for a certain space along the canal; and till the contract on the part of the Company, giving the privilege of carrying the goods on their navigation is performed, nothing becomes due to them. If the contract be for the liberty of sending goods the whole length of the navigation, the contract is not performed on their part, and nothing becomes due to them for tolls until the goods are conveyed to Stourport: if the contract be for the privilege of conveying goods an intermediate voyage, to some place short of the whole distance, the tolls do not become due until such shorter voyage is performed. But this very question has been already determined in the case so frequently alluded to, *R.* v. *Page*; and unless the Court felt that there were some strong objections to the mode of rating adopted in that case, that decision ought to govern the present case. Now no mode of rating these tolls, more consistent with justice or with policy than the rule there adopted, has been pointed out. The counsel for this Company have indeed contended that this case is distinguishable from that

in this respect, That there the toll was limited at a gross sum, 4*s*. per ton, for the whole voyage, and so proportionably for a greater or less distance; whereas here the toll is 1½*d*. per ton per mile; but there is not in reason any distinction between the two cases on that account; in the one case as well as in the other, the rate of tonnage is calculated at so much per mile. Not being able, therefore, to distinguish that case from the present, nor seeing any ground on which I can say that that decision is not consistent with the rules of law or public policy, I am of opinion that the order of sessions must be confirmed.

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Per CURIAM:

Order of sessions confirmed.

THE KING *v.* THE STEWARD, FOREMAN, TREASURER, BOOK-KEEPER, AND FREEMEN OF THE COMPANY OF FREE FISHERMEN AND DREDGEMEN OF THE MANOR AND HUNDRED OF FAVERSHAM, IN THE COUNTY OF KENT.

1799. *Nov.* 13.

[352]

(8 T. R. 352—356.)

In a return to a mandamus to a corporation to restore a member who has been removed it should appear that the body removing had proved the charge for which the member was removed. It is not sufficient to state merely that he was present when the charge was made, and did not deny it.

To a mandamus, requiring the defendants to restore M. Harman to the office of one of the freemen of this Company, the defendants made a return; stating, that the Company are a Company by prescription, and from time immemorial, have held of the lord of the said manor and hundred certain oyster-grounds, and carried on a trade in oysters, in partnership together, for the common use and benefit of the freemen of the said Company. That at certain courts called Water Courts, bye-laws had been made, whereby *inter alia* members of the Company were prohibited from carrying on a separate trade in oysters, under penalty of certain forfeitures. [As no final decision was arrived at as to the validity of these bye-laws, it seems unnecessary to

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mention them more particularly.] *That at a Water Court holden on the 28th of July, 1798, Harman, being personally present, was called upon to shew cause why he should not pay the said forfeitures; but that he did not shew any cause, nor did he ask for any time to enable him so to do, but declared in the said court that he would not pay the same: that thereupon at the said court he was called upon to shew cause why he should not be disfranchised for his said refusal; but that he did not shew any cause, nor did he ask for any time to enable him so to do; that therefore it was ordered by the said court, in Harman's presence, that unless the said forfeitures should be paid to the steward of the said court, on or before the 4th day of August next, for the use of the lord of the manor and hundred, he should be and was thereby disfranchised from being a free fisherman and dredgeman of the said manor and hundred, provisionally during the then next oyster season, and until further order of court. The return then stated, That Harman did not pay either of the forfeitures on or before the 4th of August, 1798, or afterwards; and that Lord Sondes, the lord of the manor and hundred, on the 29th of October, 1798, confirmed the said order of disfranchisement.

Wood, for the prosecutor, took several objections to this return:

[1st, The bye-law, cannot be supported, because it is in restraint of trade; and, 2ndly, Even if the bye-law could be enforced, the disobedience to it is not a cause of disfranchise-

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ment.] *3rdly, At all events, the mode of proceeding was irregular and illegal. The proceedings should have been carried on in the same regular manner as on a conviction; there should be charge of the offence; a reasonable notice to the party, to give him an opportunity of preparing for his defence; the hearing of the evidence on both sides; and then a judgment founded upon that, 1 Burr. 538; whereas here was no previous accusation of the prosecutor of the mandamus; he had no notice that any charge had been or was to be exhibited against him; but happening accidentally to be present at one of the corporate meetings, he was required to shew cause why he should not pay three

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penalties; no evidence was given in support of the charge; no time was allowed to him to make his defence; but at that very meeting he was disfranchised.

Bayley, Serjt. in support of the return:

* * As it appears that the party was present at the time, there was no occasion for any summons for him to attend: nor was it necessary to go into evidence, because he did not deny the charge: but he having heard the charge, and declaring that he would not pay the penalties, and not wishing for further time, the company proceeded to pronounce their judgment at once.

But the COURT were clearly of opinion that the return could not be supported, on account of the irregularity of the proceeding. They said that it should have been proved that the prosecutor *had committed the offence; instead of which the defendants presumed him guilty, and called upon him to shew cause why he should not pay the penalties; and that this was a decisive objection.

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LORD KENYON, Ch. J. said:

I do not agree with the counsel for the prosecutor in the whole of his objection to the bye-law. It must be remembered that the Company are partners as well as freemen. There is nothing illegal in partners agreeing to prevent any one partner carrying on a separate trade elsewhere on his own account; and if not, I do not see any reason why the same thing may not be prevented by a bye-law in the case of a company like the present. With regard to the form of the bye-law indeed, though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other. As to the irregularity of the proceedings in this case, perhaps the prosecutor's appearing may have dispensed with the necessity of any summons to him to attend; but still the charge against him should have been proved. The proceedings also seem to be objectionable on other accounts; it does not appear that the disfranchisement was by a court having authority to remove the prosecutor. Where a power of removal is not given to any

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particular part of a body, it rests with the company at large. In this case it is not stated that the court at which the prosecutor was removed, was a court consisting of the whole body, but it is called a Water Court, which may be composed of the whole company or only of some part of it; and if the latter, it should appear that they had the power of removal. Besides which, every member of the company having power to disfranchise, should have notice to attend for that particular business. However, it is not necessary to give any judicial opinion upon these points; it is sufficient to say that the return must be quashed for the objection alluded to, that the charge of which the prosecutor of this writ was accused was not proved.

So the return was quashed, and a peremptory mandamus awarded.

1799. *Nov.* 16.

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THE KING *v.* WILSON AND ELEVEN OTHERS.

(8 T. R. 357—364.)

An indictment at common law, charging the defendants with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, is good.

THIS was an indictment for a forcible entry and detainer at common law. The first count stated, That the defendants on, &c. in the parish of St. Peter, in the county of the borough of Carmarthen, with force and arms, unlawfully, and injuriously, and with a strong hand, entered into a certain mill, and certain lands, and houses, and the sites of a certain mill and certain houses, with the appurtenances, being in the possession of M. Lewis, and him the said M. Lewis from the possession of the said premises unlawfully, and injuriously, and with a strong hand, expelled and put out, and unlawfully and injuriously kept him out, and still keep him out, against the peace, &c. The third count was to the same effect, only varying in the description of the premises. The second and fourth counts were the same as the first and third respectively, only omitting the words with a strong hand. To all these counts there was a general demurrer, and joinder in demurrer.

[The demurrer having been argued,]

LORD KENYON, Ch. J.:

It is perfectly clear that a mere trespass which is the subject of a civil action, and where the words *vi et armis* are introduced as matter of form, cannot be converted into an indictable offence. But there is no doubt but that the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party grieved, restitution and damages; and therefore on an indictment on the statutes, it is necessary to state the interest of the prosecutor: but I do not know that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry, than in an indictment on the statutes. In the cases cited,† a distinction seems to have been taken between a forcible entry into a dwelling-house, and a forcible entry into other kinds of property; and it has been said that a less degree of force need appear in an indictment in the former case than in the latter. But the simple question here is, Whether the facts stated in this indictment, if they be proved as laid, do not amount to an indictable offence? It is alleged that twelve persons with force and arms and with a strong hand, violently entered into a certain mill, and lands and houses, and expelled the prosecutor: whether or not these facts will be proved is another *question; [*361] but if they be proved as laid, God forbid that it should not be an indictable offence! the peace of the whole country would be endangered if it were not so. It is said, however, that the number of the defendants in this case is not equal to that in one of the cases where the indictment was quashed, and where the Court said, that the number of the defendants alone would not make it an indictable offence: but from what is there said, it does not follow that the Court would have decided that the indictment could not have been supported, if it had charged the defendants with having committed the same degree of violence that is stated in this indictment. Therefore, in determining that the first and third counts in this indictment may be supported, we shall not overrule any of the cases that have been cited; and we shall give effect to a part of the law that ought to be

† *R.* v. *Bathurst*, Sayer's Rep. 225, and same case referred to in 3 Burr. 1702; *R.* v. *Storr*, 3 Burr. 1696; *R.* v. *Bahe and Others*, *Ib.* 1731.

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preserved, namely, that no one shall, with force and violence, assert his own title. The second and fourth counts are very properly abandoned by the prosecutor.

GROSE, J.:

The second and fourth counts being given up, the only question before us is, Whether or not the first or third counts can be supported. I thoroughly agree with those cases in which it has been decided that an indictment at common law for a forcible entry may be maintained. I admit that there appears to be a little confusion in the different cases on this subject; in some, it seems as if the words "*manu forti*" were considered to be of the essence of the offence, while in others it is said, that they mean no more than *vi et armis*. But I am not aware of any case in which it has been holden, that an indictment similar to those counts in the indictment now in dispute could not be supported. Then we must resort to principle. Now it is here stated, that at one time twelve persons, with a strong hand, entered into houses belonging to the prosecutor, and with a strong hand violently expelled him. This is clearly a public breach of the peace, and the subject of an indictment. The words "with a strong hand" mean something more than a common trespass. Therefore I am of opinion that the first and third counts are good.

LAWRENCE, J.:

Every indictment must charge sufficient to shew to the Court that the defendant has done that which in law is an indictable offence. And it has been settled in the cases alluded to, that it is not sufficient, in an indictment for a forcible entry, to charge the defendant with having entered *vi et armis*, which is the degree of force that the law ascribes to every common trespass
[*362] or entry on land; but that it is necessary to allege *that degree of force and violence in fact which constitutes the offence. The question therefore in this case is, Whether or not the words "with a strong hand," do not imply that degree of force? The statutes use the words "with a strong hand," as describing that degree of force which makes an entry or detainer of lands

criminal, and entitles the prosecutor, under circumstances, to restitution and damages. And in an indictment on the statute, it is sufficient to state, that the defendants entered "with a strong hand;" it being considered that those words imply that the entry was accompanied with that terror and violence that constitutes the offence. *Baude's* case † shews that those words are sufficient in an indictment on the statute: there it was charged, that the defendant, *vi et armis ac manu forti expulit*, &c.; and though several objections were taken to the indictment, it was not objected that a sufficient degree of force was not alleged to make it an indictable offence. So in Rast. Entr. 354, there is a count that the defendant *manu forti* entered, &c.; and this precedent is in a book of the greatest authority. Hence it appears, that it was then thought that charging the entry to be *manu forti* was sufficient to constitute a forcible entry within the meaning of the Acts of Parliament: but as it is clear that, in order to sustain an indictment on the statute, it is necessary to prove such a degree of force as would amount to a public breach of the peace at common law, why may not those words, in an indictment at common law, satisfy the Court that the entry was attended with the same degree of violence? No particular technical words are necessary in such an indictment: all that is required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace; as is manifest from the cases cited, particularly that of *R.* v. *Bathurst and others:* there the indictment consisted of five counts: the first stated, that the defendants with force and arms, and with a strong hand, entered a certain messuage, with the appurtenances, &c. concluding *contra formam statuti;* the three next counts were for a forcible entry into closes; the fifth count was for a forcible entry at common law into a dwelling-house; but in none of them, except the first, were the words "with a strong hand" used. All the Court agreed, that the first count could not be supported on the statute, because it did not state what interest the prosecutor had in the house; but RYDER, Ch. J. and FOSTER, J. thought that it was good at common law, though Mr. J. *DENISON doubted, because it

† Cro. Jac. 41.

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concluded against the form of the statute; and it had never been holden that indictments which were informal as indictments on the statutes, could be supported at common law by rejecting such conclusion. The three next counts were considered as bad: but it was ruled that the fifth count was good: and RYDER, Ch. J. speaking of the first count, said, "The words '*manu forti*' are understood to import something criminal in its nature; something more than is meant by the words '*vi et armis;*'" and there is a much more ancient case than that, in which the same thing was said. In Sty. 135, exception was taken to an indictment for a forcible entry, because the words *manu forti* were omitted; when ROLLE, Ch. J. said, that those words should have been used "to distinguish this kind of entry from an ordinary trespass." So that he thought that those words imported a greater degree of violence than the common words in trespass, "*vi et armis.*" As, therefore, those words are inserted in the first and third counts of this indictment, I am of opinion that those counts are good, especially considering the number of the defendants; and that judgment must be given for the Crown on those counts.

LE BLANC, J.:

Two objections have been taken to this indictment: 1st, That this is not an offence indictable at common law; and, 2ndly, That even if it be, the first and third counts of this indictment do not charge a sufficient degree of force to make it an indictable offence. The three cases that have been cited, two from Burrow, and the other from Sayer's Reports, are decisive authorities to shew that an indictment for a forcible entry may be maintained at common law, provided the indictment charge the defendants with having used such force as constitutes a public breach of the peace. In the two cases in Burrow, it was holden that the words "with force and arms" were not alone sufficient to make it an indictable offence at common law: for this reason chiefly, that that is the constant form of expression used in actions of trespass: but it seems to have been admitted, that if enough is alleged in an indictment to impute actual force to the defendants, the indictment is good at common law. Now

in this case there are other words besides "*vi et armis*," namely, "with a strong hand" and "unlawfully." My brother LAWRENCE has observed, that "with a strong hand," are the words used in the statutes; and I think that those words mean something more than "*vi et armis*," which are the mere formal words in an action of trespass. I am therefore of opinion that the allegation, that the twelve defendants *with force and arms, [*364] and with a strong hand, unlawfully entered and expelled the prosecutor, does impute to the defendants a degree of force and violence sufficient to support this indictment; consequently I concur in the opinion given by the Court, That judgment must be given for the Crown on the first and third counts.

Judgment for the Crown on the first and third counts.

On a subsequent day in the term:

LORD KENYON, Ch. J. said:

We wish that the grounds of our opinion may be understood. We do not in the least doubt the propriety of the decision in this case the other day; but we desire that it may not be considered as a precedent in other cases to which it does not apply. Perhaps some doubt may hereafter arise respecting what Mr. Serjt. *Hawkins* says,† that at common law the party may enter with force into that which he has a legal title. But without giving any opinion concerning that dictum one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched, it appearing by this indictment that the defendants unlawfully entered, and therefore the Court cannot intend that they had any title.

† This observation, which had been quoted in the argument, was "that no indictment for a forcible entry lay at common law, where the party had lawful right of entry; but that such indictment could only be laid on the statutes." 1 Hawk. c. 64, s. 1. The statutes referred to are 5 Rich. II. st. i. c. 7; 15 Rich. II. c. 2: 8 Hen. VI. c. 9; 31 Eliz. c. 11; and 21 Jac. I. c. 15.—R. C.

1799.
Nov. 19.

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GLAZEBROOK, Clerk, *v.* WOODROW, Clerk.

(8 T. R. 366—375.)

Plaintiff covenanted to sell to the defendant a school-house, &c. and to convey the same to him on or before the 1st August, 1797, and to deliver up the possession to him on 24th June, 1796; and in consideration thereof defendant covenanted to pay the plaintiff 120*l.* on or before the 1st August, 1797; held that the covenant to convey and that for the payment of the money were dependent covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed or tendered a conveyance to the defendant.*

In covenant, the declaration stated, that by articles of agreement, under seal, made on the 10th of March, 1796, between the plaintiff and the defendant (after reciting that the plaintiff had established a grammar-school at Warrington, in which he had many scholars; and for the purpose of conducting the said school with convenience, had possessed himself of a piece of ground, on which he had erected a building appropriated to instruction, &c.; and being about to leave Warrington, had agreed with the defendant to sell him, not only his right, title, and interest in the said ground and building, subject to a yearly ground-rent of 16*s.* 6*d.* payable to J. Blackburne in fee, but to surrender to him the pupils he then had under his care, so far as in him lay, together with all benefit arising therefrom, for the considerations thereinafter mentioned) the plaintiff covenanted and agreed to and with the defendant, that he, the plaintiff, would, on or before the 1st of August, 1797, convey to the defendant, his heirs, &c. the said ground, with the buildings thereon erected, subject as aforesaid, and the fixtures therein, for all the plaintiff's right, title, and interest in the premises; and would, on or before the 24th of June, 1796, surrender up the use and enjoyment of the said premises, and deliver over, as far as in him lay, all the pupils he might then happen to have under his care, to the care of the defendant, and all the profits arising from them; and also that he, the plaintiff, would in the mean time use his utmost endeavours with the parents and guardians of the children committed or to be committed to his care in Warrington, to induce them to continue their children

* See note to *Morton* v. *Lamb*, p. 39, *ante*.—R. C.

under the care and tuition of the defendant, &c.; and in consideration thereof, the defendant covenanted and agreed to and with the plaintiff, that the defendant, his executors, &c. would, on or before the said 1st of August, 1797, pay the plaintiff, his executors, &c. the sum of 120*l.* with lawful interest, from the 1st of January next preceding the said 1st of August. The plaintiff then averred, that in pursuance of the said articles he afterwards, viz. on the said 24th of June, 1796, surrendered up the use and enjoyment of the said ground, with the buildings, &c. to the defendant, who thereupon entered upon, and became, and was, and from thence hitherto hath been, and still is thereof possessed: and also then. delivered over, as far as in *him lay [*367] all the pupils he then had under his care, and all the profits, &c.: and although the plaintiff had well and truly performed everything else in the said articles contained on his part, yet protesting that the defendant had not performed anything in the said articles contained on his part, the plaintiff averred that the defendant did not, on the said 1st of August, 1797, or at any other time before or since, pay the said 120*l.* with interest, &c. to the plaintiff, but wholly refused to pay the same, &c. wherefore, &c.

To this the defendant pleaded, 1st, That from the time of making the said articles, until and on the 1st of August, 1797, he (the defendant) was ready to accept a conveyance of the said ground in the declaration mentioned, with the buildings, &c. for and during all the plaintiff's right, title, and interest in the same; and at the same time to pay the said 120*l.* in the declaration mentioned, with interest, &c. if the plaintiff would have made or procured any such conveyance or assurance; yet that the plaintiff did not, on or before the said 1st of August, 1797, or at any time since, convey to the defendant the said ground, with the buildings, &c. for and during all the plaintiff's right, &c.; wherefore the defendant had not paid to the plaintiff the said 120*l.* &c. There was a second plea to the like effect, stating that the plaintiff had not tendered any conveyance of the premises, &c.

To these pleas there was a general demurrer, and joinder in demurrer.

[After argument, in which were cited the cases of *Thorpe* v.

GLAZEBROOK v. WOODROW. *Thorpe*, Salk. 171; *Campbell* v. *Jones*, 6 T. R. 570 (3 R. R. 263); *Boone* v. *Eyre*, 2 Bl. Rep. 1312, 2 R. R. 768; *Goodisson* v. *Nunn*, 4 T. R. 761,]

[370] LORD KENYON, Ch. J.:

The cases which have been mentioned are in my recollection; and although I have not the least doubt what the sense and justice of this case require to be done, yet if I found that I should thereby transgress any technical rule of law which had been established, I would not set up my opinion against the wisdom of those who are gone before me. But I am fully satisfied that what justice requires to be done in this case will not contravene any principle of law which has been established in those cases. The general rule which governs them all is, That every man's agreement is to be performed according to his intent, as far as that is to be collected from the particular instrument. Now here the case is, That the plaintiff, being in possession of a school, covenanted with the defendant to convey to him the good-will of it (if I may use the expression) and the building itself on or before the 1st of August, 1797, and in the mean time he consented to put him in possession of the premises on some prior day: on the other hand, the defendant engaged to pay him a stipulated price in consideration of all that the other had undertaken to do on or before the same 1st of August; and now the plaintiff who is to execute the conveyance, and who is also the person to pay for it, not having made it, or made a tender of it to the defendant, nevertheless calls upon him by this action to pay the consideration-money. The very statement of such a claim is enough to refute it. If these be not dependent covenants, it is difficult to conceive what covenants are so. The very substance of the consideration to entitle the plaintiff to receive the money, was the making of the conveyance required; and it is admitted that he has not done it; that makes an end of the question. The case of *Campbell* v. *Jones* was very different from the present; for there the instruction to be given was not to be, and could not in the nature of the thing be, performed at the same time with the payment of the money by the defendant, for which a certain time was limited; whereas no time was

limited for giving the instruction. But here the parties have stipulated for the conveyance and the payment to be performed at the same time; and if we were to hold otherwise in such a case as the present, the greatest injustice might be done; for, supposing in the instance of a trader who had entered into such a contract *for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid. The injustice of such a procedure is too manifest to be insisted upon further.

GROSE, J.:

The question is, Whether these covenants be dependent or independent? and that must be collected from the apparent intention of the parties to the contract. There is certainly some confusion in the books on this subject, some of the older cases, leaning to construe covenants of this sort to be independent, contrary to the real sense of the parties, and the true justice of the case. But the later authorities convey more just sentiments; and the case of *Kingston* v. *Preston*† was the first strong authority in which they prevailed in opposition to the former. Nothing indeed could exhibit the doctrine which ought to prevail in these instances in a stronger point of view than the circumstances of that case; for there, if the plaintiff had prevailed, the most flagrant injustice would have been committed. The fact was that the defendant, being possessed of a very large stock in trade, covenanted with the plaintiff to assign the same to him and another person at the end of a twelvemonth at a fair valuation, when deeds of partnership were to be executed between the two last persons; and the plaintiff covenanted that he would at and before the sealing and delivery of the deeds, procure good and sufficient security to be given to the defendant, and to be approved of by him for the payment of a certain stipulated sum by monthly instalments; and there the attempt was by the plaintiff to get possession of the whole stock in trade of the defendant to a great amount, without giving him any security at all, to

† Cited at large in *Jones* v. *Barkley*, Dougl. 689.

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his inevitable ruin. But the absurdity and injustice of the thing struck the Court so forcibly, that they said it could never have been the intention of the parties, that the defendant should surrender his whole fortune into the plaintiff's hands without the previous security which he had insisted upon, and that he should solely rely upon his remedy by action for the breach of the plaintiff's covenant: they therefore gave judgment for the defendant. I have since found that that was not the first case where those sentiments began to be entertained; for it appears from a late

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publication *of Reports from the manuscripts of Lord Chief Justice WILLIS, that in a case of *Thomas* v. *Cadwallader*,† his Lordship noticed the injurious tendency of the doctrine which had before that time prevailed in these cases; and seemed very desirous that the governing rule should be so to construe such covenants as that the real intention of the parties should be carried into effect, to attain the true justice of the case. This was afterwards done in the case of *Kingston* v. *Preston*; and that has since been settled to be the rule in many cases. Now here the plaintiff covenanted to convey on or before the 1st of August, 1797, though the defendant was to be put in possession before; and the reason why the conveyance was not to be executed before, is obvious; because that was the day on which the money was to be paid. Then what is the true justice of this case, and the evident meaning of the parties? It is plainly this, That the execution of the conveyance and the payment of the money should be concurrent acts; and even the payment of the interest was to be deferred till the 1st of August, though it was to run from the 1st of January preceding. Then there is an end of the question; because it is not pretended that the plaintiff had conveyed or was ready to convey at the time. How far the determination in *Boone* v. *Eyre* militates against the principles I have laid down, may be a matter of doubt; but the intention of the parties is, or is assumed to be, the governing principle of all the late determinations.

LAWRENCE, J.:

The plaintiff's case is attempted to be maintained on the

† Willis's Rep. 496.

supposed intention of the parties, and on authorities: 1st, On the intention of the parties, it is said that where one promises to another to perform a certain thing in consideration of several matters to be performed by himself, he is entitled to maintain an action against that other for non-performance of his engagement, if he himself has performed any one of the things stipulated by him to be done. Therefore that in this instance the plaintiff, who has covenanted to put the defendant in possession, and to convey the premises to him in consideration of a certain sum, is entitled upon performance of one of those things, to maintain his action for the consideration money. But it is clear that, if the agreement appear to be that the whole of what the plaintiff engaged for, was to be done before the money was to be paid, it will not follow that, because a part only has been performed, he can recover the money, and leave *the defendant to his remedy upon the agreement for the breach of the other part; for whether one promise be the consideration of another, or whether the performance and not the mere promise be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement. Now, suppose the terms of agreement had been that the plaintiff was to put the defendant in possession of and to convey the premises to him on or before the 1st of August, and that upon the defendant's being put in possession, and the conveyance made to him, he was to pay the purchase-money on or before that day, —there could be no doubt but that the conveyance must be made as well as the possession delivered up before any right to the purchase-money would accrue. Whatever the form of the words may be, if we can collect from the face of the instrument that the whole was to be performed by the plaintiff before the money was to be paid, nothing short of performance of the whole can enable him to sustain this action for the money. But authorities have been cited to shew that, Where a certain time is fixed for the payment of money in consideration of certain acts stipulated to be done, a partial performance of such acts is sufficient to found an action for the money; but the cases cited do not warrant so general a conclusion. Part execution is only a circumstance from whence the intention of the parties is to be collected; but

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nothing is to be inferred from it in favour of the plaintiff in this case; for though the defendant was to be put in possession in June, 1796, and the money was to be paid in August, 1797, yet, as that also was the time fixed for the execution of the conveyance, it is plain that the defendant did not intend to part with his money till his title was secure. In the case of *Boone* v. *Eyre*,† the plaintiff had sold to the defendant an estate in *Dominica*, with the negroes, under the usual covenants for a good title and quiet enjoyment, and further assurances, in consideration of a sum in gross and a certain annuity for lives, which the defendant covenanted to pay; "he the plaintiff well and truly performing all and singular the covenants, clauses, recitals, and agreements in the said indenture of sale contained:" and in bar to an action of covenant for the arrears of the annuity, besides assigning breaches of specific and partial covenants, the defendant by his
[*374] 4th plea pleaded *"that the plaintiff at the time of making the said indenture had not in himself full power, true title, and good and lawful authority to bargain, sell, and release the said plantation, and negroes, &c. in manner and form as in the said indenture mentioned." The Court said it would be strange if such a defence were to be allowed, when if any one negro on the plantation were proved not to have been the property of the plantiff, it would bar his action for the annuity. The judgment of the Court there went on the ground that, in the form the breaches were assigned, the plea did not necessarily go to the whole of the consideration. But if the plea had been that the plantiff had no title at all to the plantation itself, I do not know that it would not have been holden sufficient. So in *Campbell* v. *Jones*, the defendant against whom the action was maintained had the whole of what was to be conveyed to him; and the substantial part of the consideration was the right of using the method of bleaching described in the patent; though in addition to that the plaintiff had also engaged to instruct him in the use of that method; the not doing of which might be recompensed in

† This was cited from the case reported in 1 H. Blac. 273, note *a* (2 R. R. 768); and also from a MS. note which is referred to by Lord KENYON in giving judgment in *Campbell* v. *Jones*, 6 T. R. 573, 3 R. R. 267; and not from the case reported by Mr. Just. Blackstone, 2 vol. 1312.

damages. That instruction might consistently with the plaintiff's covenant, as well be given after as before the time specified for the payment of the money, and therefore it was not necessary to be averred in an action to recover the money. Therefore neither upon the reason of the thing nor the authorities is the plaintiff entitled to recover.

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LE BLANC, J.:

This case falls within the rule first laid down in *Kingston* v. *Preston*, that no person shall call upon another to perform his part of a contract until he himself has performed all that he has stipulated to do as the consideration of the other's promises. This rule, I think, applies to every case of a sale of property, where one engages to convey on a certain day, and the other to pay at the same time; and this, whether the one be stated in terms to be in consideration of the other or not. In neither case will the Court compel one party to perform his part, until the other has done or has offered to do his own. This is the case of a covenant for the sale of a school-house, where the plaintiff covenanted to convey on or before a certain day; and the defendant on or before that day covenanted to pay him. The payment therefore is the consideration for the conveyance, and cannot be enforced till that be made, or at least offered to be made by the plaintiff. But an attempt has been made to bring this case within the distinction taken in some of the cases; where *one party having had the advantage of all the material part of the agreement, the other has been permitted to sustain his action for the consideration, although there may not have been a literal performance of other parts. Thus in *Boone* v. *Eyre*, the substantial part of the agreement being the conveyance of the property, in respect of which the annuity was to be paid, the Court held it to be no answer to an action for the annuity to say, that the plaintiff had not a good title in some of the negroes which were upon the plantations, because all the material part of the covenant had been performed; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest. So in *Campbell* v. *Jones* the material part was the conveyance of the patent right; and that

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being performed, the Court held, that the giving of the instruction concerning the proper use of it, which might be given at any time afterwards, need not be averred in order to sustain the action for the recompense; but that a breach of that part of the agreement might be compensated in damages. So here the material part of the covenant being the conveyance, the plaintiff cannot entitle himself to the money until he has shewn that every thing was done which he had undertaken to perform on his part, as the consideration of that payment.

Judgment for the defendant.

1799. *Nov.* 22.

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BENSON *v.* CHESTER.

(8 T. R. 396—403.)

A claim of a right of common without stint as annexed to an ancient messuage, without land, cannot, as such, exist by law. An ancient deed of feoffment, granting the wastes of a manor to feoffees, in trust to permit the tenants and inhabitants, &c. to use and enjoy the same as they had formerly done or been accustomed to do, must be taken to mean such a right of common as may by law exist, namely, a right of common restricted by levancy and couchancy.

THIS was an action upon the case, for injuring the plaintiff's right of common. The plaintiff declared in respect of his possession of a certain messuage and divers parcels of ground at Thorne, lying within the manor of Hatfield, in the county of York, for a right of common of pasture in and throughout all the commonable waste grounds in the manor, for all his commonable cattle levant and couchant upon his said messuage and land, &c.; and that the defendant wrongfully surcharged the said common, &c. The second count was for unlawfully depasturing the said common, &c.; and there were other counts stating the fact in different ways. The general issue was pleaded.

At the trial before Lawrence, J. at the last assizes at York, the plaintiff proved his right of common in the usual way for his cattle levant and couchant upon his messuage and land, by proof of the exercise of such right by himself and those whose estate he had. He also proved that the defendant had turned

out a great number of cattle on the common. Evidence was also given of a decree in the Court of Exchequer in 1631, made in a cause between Sir Cornelius Vermuden, farmer of his Majesty's manor of Hatfield, plaintiff, and Portington and others defendants, reciting as is hereafter recited in the following deed, and decreeing that a conveyance should be made to the tenants, &c. of the manor, as is in that deed mentioned, of certain lands, wastes, &c. (being the waste or common in question) in lieu of their right of common over the rest of the manor wastes, as mentioned in the following deed. The deed of feoffment was *then proved, dated 15th July, 1633, inrolled in Chancery, [*397] between the said Sir Cornelius Vermuden, Knt. and J. Gibbon, Esq. of the one part, and Henry Lee, and fifteen other persons of the manor of Hatfield, of the other part (reciting that King Car. I. was seised in his demesne as of fee in right of the Crown, of the manor of Hatfield in the county of York, and of Hatfield Chace, and of divers wastes thereto belonging, great part whereof was subject to be overflowed; and that he had before appointed certain commissioners to treat with the tenants and inhabitants of all the townships, precincts, &c. in and adjoining to the wastes claiming right of common there, touching what part of the commons to be improved, they would accept in full satisfaction of their right and title to the residue of the same; and reciting further, that disputes had arisen between the said Sir Cornelius Vermuden (who had undertaken to drain the wastes of the manor in consideration of a grant of one third of the lands from the Crown in severalty) and the tenants and inhabitants of the said manor, &c. which were referred to the arbitration of certain commissioners appointed by the Crown; and that it was by them awarded, that the tenants of the manor of Hatfield, and the members thereof, should have unto them and their heirs, or such persons and their heirs as they should appoint, their former allotments for their common confirmed unto them, according as they were set out by former commissioners therein named on the 14th of March, 1627, with certain additions therein stated; and reciting further, that King Charles I. had by his letters patent of the 5th Feb. 4 Car. I. granted to the said Sir Cornelius Vermuden, Knt. all the said

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manor of Hatfield, &c. and all the lands, rents, &c. thereof, with all the wastes and commons thereunto belonging; and that the said J. Gibbon was lately become interested in some part thereof, under Sir C. Vermuden; by which deed of feoffment the said Sir C. Vermuden and J. Gibbon granted, enfeoffed, and confirmed to the said H. Lee, and the fifteen other persons named, certain lands within the manor particularly described (being the same that had been decreed to be conveyed in lieu of their right of common) and all and singular the commons and turf moors, rights, profits, privileges, &c. to the same premises or any part thereof belonging, or to any the several messuages, lands, tenements, or hereditaments of any of the said tenants belonging or in anywise appertaining, and all the right, title, and interest of the grantors therein; habendum to them and their heirs, upon trust, for the sole benefit of themselves and their *heirs; "and of all and singular other the tenants and inhabitants of Hatfield, Thorn, Duncroft, Stainford, Fishlake, and Silk-houses; and of all and other the tenants and inhabitants of the said manor of Hatfield, severally and respectively to use and enjoy the same, and every part thereof, as they formerly had done or been accustomed to do."

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This action was brought in respect of the wastes or commons conveyed by the above-mentioned deed.

The defendant claimed a right of common without stint, over the same wastes, in respect of what was called an ancient common-right house, without any land annexed to it; and after endeavouring by cross-examination of the plaintiff's witnesses to establish the same, by proving instances of user to that effect, his counsel offered to shew by evidence that the right of common had been exercised by the occupiers of such ancient common-right houses to any extent that the parties could afford to stock, without any regard to levancy and couchancy; and that the plaintiff himself was only entitled to his right of common in respect of his occupancy of one of such ancient houses, and not in respect of his land annexed. But LAWRENCE, J. was of opinion, that the claim of a right of common without stint, as annexed to a house without land, whereon the cattle could be levant and couchant, even supposing it were proved in fact to

have been exercised by the occupiers of such houses, could not be supported in law, according to the doctrine laid down in the case of *Scholes* v. *Hargreaves*; * and he said that if the right of turning on cattle without stint did belong to the houses, it must be by considering the tenants as having an interest in the wastes in the nature of a tenancy in common: but he thought that could not be so considered in this case, because the land was vested in the feoffees in trust to permit the tenants of the manor to enjoy it in the same manner as when the soil was in the Crown; at which time it was clear that there only existed a right of common. Under these directions the jury found a verdict for the plaintiff.

A rule having been obtained, calling on the plaintiff to shew cause why there should not be a new trial on the ground of misdirection,

Law, *Topping*, and *Lambe*, were to have shewn cause against it; but the Court desired to hear the other side.

Wood and *Holroyd* in support of the rule: [399]

It is notorious that many such rights as this claimed by the defendant, are acknowledged in many parts of the kingdom; and property to a very great extent is implicated in the present question. In several instances of private inclosure Acts, issues have been directed to try whether the rights of common belonged to the owners of ancient messuages, or to the owners of messuages and lands; which direction would have been nugatory if no such right could exist by law in the former. In the cases of *Wallingfer* inclosure in Yorkshire, and of *Pickering Forest* in the same county, the issues were found in favour of the owners of the messuage; no objection was taken in point of law to such verdicts, but the parties interested acquiesced, and those rights have been ever since acted upon. The same right prevailed on King's Sedgemoor in Somersetshire; which was mentioned by Mr. Justice GOULD, upon the trial of the Wallingfer issue; and upon the late inclosure of that moor, allotments were accordingly made to the owners of those old tenements, called

* 5 T. R. 46, 2 R. R. 532.

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Auster Tenements. So in a replevin tried before Mr. Justice WILSON in 1789, wherein the right of these ancient messuages over the waste in question came in controversy, he decided in favour of their right.—Admitting then that this right has been exercised in fact as far back as living testimony can go, which is evidence of its existence, not only since, but before the deed of feoffment, it must now be taken to be the same ancient right that is recognized and confirmed by that deed. And after so long an usage the Court will make every presumption in support of the right, if there be any way in which it can exist by law. It appears that originally the manor of Hatfield, and all the wastes to the extent of 60,000 acres, belonged to the Crown; and that in 1630, the Crown entered into a contract with Sir Cornelius Vermuden to grant him one third, upon condition of his draining the whole. This agreement could not be executed without the consent of the tenants who had rights of common on the wastes; whereupon a commission issued, under which the tenants contracted and agreed to relinquish their rights over the one third, in consideration of having several parts of the wastes allotted to them in severalty, discharged from all claim or title on the part of the lord. A few years afterwards (the whole manor having been in the mean time conveyed by the Crown to Sir C. Vermuden) the deed of feoffment was made for carrying that agreement into execution; whereby the wastes in question were conveyed to
[*400] *trustees in fee, in whom the use was executed, for the benefit of all the tenants and inhabitants of the manor, to use and enjoy the same in the same manner they had been accustomed to do. Now the right claimed by the defendant may be supported in one or other of two ways: either first, by supposing that prior to the deed of feoffment, the owners of the ancient messuages were tenants in common of the sole pasturage of the wastes;† which is shewn by the mode of enjoyment exercised ever since; and which may be taken to be the same as is referred to in the deed of feoffment. Or, secondly, By presuming that at the time of that grant, a release was executed by the tenants of their ancient right of common over the whole or those parts

† Vid. *Revell* v. *Jodrell*, 2 T. R. 424, 1 R. R. 506.

of the wastes which were granted in severalty to Sir C. Vermuden; and that they took a new estate in the remaining wastes under that deed. In that case the ancient right of common, which, according to *Tyrringham's* case,† must have been common appurtenant and not appendant, supposing it to have existed in the manner now contended for by the plaintiff, was extinguished; for by a release of part of the right of common the whole is gone. *Rotheam* v. *Green*, Cro. Eliz. 593; *Morse* v. *Well*, 1 Brownl. 180; *Tyrringham's* case, 4 Co. 38, *a*; *Wild's* case, 8 Co. 79, *a*. Then the deed of feoffment could not operate as a re-grant of the old right of common, because the use was executed in the feoffees and their heirs; and therefore the tenants can only take an equitable interest, and not their ancient legal right of common. This therefore will exclude the question of levancy and couchancy, and consequently is not within the reason of the case of *Scholes* v. *Hargreaves*,‡ where the right was claimed *quà* right of common. The question will turn upon the fact, In what manner the waste was enjoyed by the tenants before the deed of feoffment? and the evidence will shew that the owners of the ancient messuages alone enjoyed the right of turning their cattle on the wastes without stint.

LORD KENYON, Ch. J.:

There does not appear to be the least pretence for the owners of the houses claiming the soil in the wastes as tenants in common: at the trial they did not claim such a right, and the facts of the case negative it; nor has the defendant's claim to a right of common for an unlimited number of cattle, as annexed to his messuage only, any better foundation. *To one [*401] argument urged on behalf of the defendant I cannot give my assent. It is said, that a release of a right of common over part of the common, is an extinguishment of the whole right of common; and cases have been cited to that effect: but I should wish to examine those cases thoroughly before I subscribe to such a position, especially where all the commoners join in the release. A release by one commoner of his right over part of the common, may possibly operate as a release of his right

† 4 Co. 37, *a*.

‡ 5 T. R. 46, 2 R. R. 532.

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over the whole; but if that were the consequence of a release by all the commoners, there would long ago have been an end of almost all the rights of common throughout the kingdom. But the determination of that question one way or the other, will not affect this case: nothing can be clearer than that the parties claiming under this feoffment can only claim a right of common. In the common case where the lord of a manor conveys away part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners as well over that part of the wastes that the lord has conveyed away as over that part that he retains in his own hands. But this deed of feoffment is cautiously drawn, to avoid all disputes. Then it is said that this is an use executed in the feoffees; but that use is as to the right of the soil: but the right of common is an easement over the soil; they are collateral rights, and may exist in different persons. The right of the commoners under that deed is to be exercised as it had been formerly; and that right was a right of common to be measured by levancy and couchancy. It is contended however, on the part of the defendant, that the owner of a messuage only within this district, or the owner of a messuage with only a square yard of land annexed to it, may collect as many cattle as he can from all parts of the kingdom, and stock them on this common: but such a right of common cannot in law exist. I am therefore of opinion that the directions of the learned Judge were rightly given.

GROSE, J.:

The right now claimed by the defendant to the soil, as a tenant in common, was not set up at the trial; and it is inconsistent with the feoffment. By that deed the tenants of the manor were to use and enjoy the commons and turf moors "as formerly they had done or been accustomed to do." Then how had the commoners been accustomed to enjoy this right? By law they could only enjoy it as commoners, for cattle levant and couchant. Therefore there is no pretence to say that the [*402] *owner of a house without land, has a right to turn on any number of cattle, without regard to levancy and couchancy.

LAWRENCE, J. having tried the cause, declined giving any opinion now.

LE BLANC, J.:

This is an action on the case, brought by the plaintiff for a surcharge of common by the defendant; and the plaintiff declares on his possession of the right of common, by virtue of a messuage and land of which he is possessed, alleging that the defendant interrupted him in that right. The objections made by the defendant are, 1st, As to the manner in which the plaintiff claims his right; and, 2ndly, With respect to the right of common claimed by himself. But the plaintiff declared on his possession; and at the trial he clearly proved his enjoyment of the right of common which he claimed in his declaration; it also appeared that the defendant had turned out on this common a number of cattle which were not levant and couchant on any land that he possessed within the parish, but which he had brought from other parishes. In this situation the plaintiff was entitled to a verdict, unless the defendant could support his claim to a right of common for any number of cattle without stint, by reason of his possession of an ancient messuage. This manor was formerly in the Crown; and in consequence of an adventurer stepping forward, who engaged to drain this large tract of land, he was to receive a certain proportion of the land in severalty, over which the commoners were to have no right of common; and the rest of the land was to be drained for the use of the commoners. In order to carry this into effect, the deed of feoffment was executed, by which certain parts of the commons were conveyed to feoffees by way of use executed in them, but in trust to permit the tenants, &c. to use and enjoy the common in the same manner as they had formerly done. The argument now urged on behalf of the defendant is, that by this feoffment the enjoyment of the common by the commoners was to be in the same manner as before, that since that time they have in fact enjoyed it by turning on any number of cattle they pleased without regard to levancy and couchancy, and that this was strong evidence to shew that before that time they had been accustomed so to enjoy the right

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of common. Now admitting that evidence of subsequent usage would be evidence of prior usage, yet the language of this deed must be understood as confining the enjoyment of the common to the manner in which the commoners had before been legally [*403] *accustomed to enjoy it, and not to the manner in which many persons had enjoyed it by usurpation, as is frequently the case. Now it is clear from the decree in 1631, and the feoffment which was made in consequence of it, that before that time these persons held and enjoyed these wastes as commoners; and if so, they could only enjoy that right subject to those restraints and limitations that the law imposes on commoners. Whether the right conveyed by that deed was a legal or only an equitable right, is immaterial in this action, because the plaintiff has declared on his possession; it is equally immaterial whether the defendant's right be a legal or an equitable right, because he has surcharged the common by putting on more cattle than he had a right to do. The feoffment only conveyed a right to the commoners to use the common as they had enjoyed it before; that right may be measured by levancy and couchancy; and as the defendant did not use the common in right of any messuage and land in the parish on which the cattle could be levant and couchant, he surcharged the common; and therefore I perfectly concur in the opinion given by the learned Judge at the trial.

Rule discharged.

C. P. EASTER TERM.

CURRY *v.* WALTER.

(1 Bos. & P. 525—529.)

1796. *May* 9.

[525]

An action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual.† *Quære.* Whether the matter of justification ought not to be pleaded?

THIS was an action for printing and publishing in the newspaper called *The Times*, under the title of "Law Reports," a libel on the plaintiff. It imported to be an account of an application to the Court of King's Bench for an information against the plaintiff and a Mr. Bingham, both justices of the peace for Hampshire, for refusing to licence an inn at Gosport.

The ground of the application, as moved by *Mr. Erskine*, was that the magistrates had conspired with the landlord of the innkeeper *to find a pretence for refusing him a licence, thereby to [*326] compel him to surrender a very beneficial lease to his landlord. The supposed libel, which was set out *verbatim* in the declaration, stated the circumstances of this charge very distinctly, and concluded by shewing that the rule was not granted, because there was no affidavit on the part of the prosecutor of the

† Though the principle of this case is now settled law, the report is retained as the earliest case in which the principle is distinctly recognised. The decision is approved and followed in *Lewis* v. *Levy* (1858) E. B. & E. 537, 560, 27 L. J. Q. B. 282; and considered as settled law in *Wason* v. *Walter* (1868) L. R. 4 Q. B. 73, 87, 38 L. J. Q. B. 34; and in *Usill* v. *Hales* (1878) 3 C. P. D. 328. Whether a report of the *judgment* alone, *in a case tried by a judge without a jury* under the modern system is necessarily privileged, has been the subject of some discussion in *Macdougall* v. *Knight* (C. A. 1886, and H. L. 1888) 17 Q. B. D. 636, 55 L. J. Q. B. 464, and 14 App. Ca. 194, 55 L. J. Q. B. 537; and second action between same parties (1890) 25 Q. B. D. 1, 59 L. J. Q. B. 517. The affirmative was maintained by the Court of Appeal, questioned by the opinions of the learned Lords (particularly by Lord HALSBURY, C.), in the House of Lords, and reaffirmed by *dicta* of the Lords Justices of Appeal in the latter action. As to contemporaneous newspaper reports of judicial proceedings, see 51 & 52 Vict. c. 64, s. 3. —R. C.

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magistrates having had due notice of the motion. The defendant pleaded the general issue, and at the trial, after the plaintiff had proved the publication of the paper in question by him, produced as witness a person whom he employed to collect legal intelligence for the use of his paper, in order to prove that the report was a true and faithful account of what passed in the Court of King's Bench upon the motion. It was objected on the other side, that this defence ought to have been put upon the record, and could not be given in evidence under the general issue. This objection, however, was overruled by EYRE, Ch. J. who in summing up, told the Jury, that though the matter contained in the paper might be very injurious to the character of the magistrates, yet he was of opinion, that being a true account of what took place in a court of justice which is open to all the world, the publication of it was not unlawful. The Jury found a verdict for the defendant.

A rule *nisi* for setting aside this verdict having been obtained on a former day, upon two grounds, 1st, That the matter given in evidence did not amount to a defence in law: and 2ndly, That supposing it to be a good defence it ought to have been pleaded in bar to the action, and not received in evidence under the general issue.

Le Blanc, Serjt. now shewed cause:

There are two points to be considered: First, whether the defendant was at liberty to give in evidence under the general issue, that the account of the case published was a true account? Secondly, whether at all events it is not a libel to publish what did actually pass in court, if injurious to the character of the plaintiff? It may be admitted, that a defendant cannot justify an assertion on the ground of its being true, without specially pleading such justification. But in this case the libel was not justified as true, but evidence was merely called to shew that the account published in *The Times* was a true account of what passed in the King's Bench. Many cases may be cited to shew that the defendant is entitled to prove the occasion of speaking particular words. As in the case of giving the character of a servant: which was so ruled by Lord MANSFIELD at *nisi*

**prius.*† Or if a man repeat an injurious assertion expressing his concern of its having been made by another, and without any intention of doing an injury himself.‡ In Cro. Jac. 90, a case is cited of a clergyman, who in his sermon quoted a passage from "Fox's Book of Martyrs," scandalizing a person then present; on action brought against him, and the general issue pleaded, he gave the matter in evidence, and it was held that "it being delivered but as a story and not with any malice or intention to slander any, he was not guilty of the words maliciously." So it is not actionable for one to tell another confidentially not to trust a tradesman: for it is only by way of counsel. *Vanspike* v. *Cleyson*, Cro. Eliz. 541. The same doctrine was laid down by PRATT, Ch. J. in the case of *Herver* v. *Dawson*, Sittings after Term, 5 Geo. III. C. B. Bull. N. P. p. 8, edit. 2. If the account published by the defendant be a libel, no man can report a case decided in a court of justice reflecting upon the character of another. Supposing the facts contained in the affidavits on which the motion in the King's Bench was founded to be false, the deponents are liable to be indicted. A counsel is justified in stating what appears in his instructions, but he must not go out of his§ way to vilify. In this transaction nothing of that kind appeared. The defendant therefore might lawfully report what the counsel might lawfully say.

Adair and *Marshall*, Serjts. *contrà*:

1st, The matters given in evidence did not amount to a defence in law. 2ndly, If they did, they ought to have been pleaded. It may be admitted, that the parties, counsel and witnesses in a cause are exempt from an action of slander, provided the allegations be made in a court of competent jurisdiction, and be pertinent to the cause, *Waterer* v. *Freeman*, Hob. 266; *Weston* v. *Dobniet*, Cro. Jac. 432; and *Astley* v. *Younge*, 2 Burr. 807. It has been held, that *scandalum magnatum* would not lie for bringing an unfounded charge of forgery against a

† *Edmondson* v. *Stevenson & Ux.* Sitt. Westm. after E. 6 Geo. III. K. B. Bull. N. P. p. 8, ed. 2. The doctrine of the above case was expressly recognised in *Weatherston* v. *Hawkins*, 1 Term Rep. 110.

‡ 1 Lev. 82.

§ *Brook* v. *Montagus*, Cro. Jac. 90.

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peer, because the charge was exhibited in a court of justice. *Lord Beauchamp* v. *Sir R. Croft*, Dy. 285, *a*. For the same reason an action will not lie for a false charge before a justice of the peace. *Ram* v. *Lamley*, Hut. 113, and per Cur. Cro. Jac. 432, or for a false charge in a plea. *Ibid.* So no action lies against a witness for a false charge. *Harding* v. *Bodman*, Hutt. 11, Brownl. 2 S. C. and *Buckley* v. *Wood*, Cro. Eliz. 230. So a counsel is not liable for false and injurious words, though not precisely pertinent, to the issue, if they were in mitigation of
[*528] damages, and *he spoke them by instruction of his client. *Brooke* v. *Montague*, 1 Roll. Ab. 87. The reason of the privilege in the above cases is that the suit is legal, though the foundation of it is false; and Lord Coke says, 4 Rep. 14, b., "If actions should be permitted in such cases, those who have just cause of complaint would not dare to complain for fear of infinite vexation." Besides "there can be no scandal if the allegation be material, and if it is not, the Court before whom the indignity is committed by immaterial scandal, may order satisfaction and expunge it out of the record, if it be upon the record." Per Lord MANSFIELD, 2 Burr. 810. This privilege, however, being *ex necessitate* has always been construed strictly and confined to the above cases. If a man exhibit a false charge in a court which has no jurisdiction, as felony in the Star-Chamber, *Buckley* v. *Wood*, 4 Co. 14, *b*, Cro. Eliz. 230, S. C. and Hob. 267, or an appeal of murder in the Common Pleas, 4 Co. 15, it is actionable. It appears also that a false charge, though made in a court of competent jurisdiction, if talked of elsewhere at large is libellous, 4 Co. 14, *b*,† and Justice Crook's case, March, 76,‡ and this has been expressly held of a petition to the King containing slanderous matter. *Hare* v. *Miller*, 3 Leon. 138, and of a petition to the House of Commons. *Lake* v. *King*, 1 Saund. 132.§ 1 Lev. 240, S. C. 1 Sid. 241, S. C. and of the publication of proceedings in prohibition. *Waterfield* v. *The Bishop of Chichester*,‖ 2 Mod.

† *Sed quære*, if that case warrants this deduction?

‡ *Vid. etiam Rex* v. *Salisbury*, 1 Lord Raym. 341.

§ In the notes on this case by Mr. Serjt. *Williams* in his learned edition of Saunders, both the points insisted on by *Adair* and *Marshall*, Serjts., are very fully discussed.

‖ *Sed vide* what is said of this case by LAWRENCE, J. (in *R.* v. *Wright*, 8 T. R. 207, *ante*, p. 654), who shews

118. Lord MANSFIELD often mentioned that Lord HARDWICKE granted an attachment against an attorney who published his brief after the trial of a cause, deeming it a libel. There was also an action in this court against the present defendant, for publishing an account of a trial in the King's Bench before Lord KENYON, in which some severe animadversions made by his Lordship upon the plaintiff were set forth; and Lord LOUGHBOROUGH, before whom it was tried, held it a libel, and a verdict was found for the plaintiff. The late case of *The King* v. *Lord Abingdon*, Esp. N. P. Cas. 226, is an authority on this point. There it was held that a publication by the defendant of a speech which he had made in the House of Lords containing slanderous matter, was a libel. The only distinction that can be taken between the cases, is, that the present defendant is not as the defendant in that case was personally interested in, or party to the original scandal, and therefore no malice can be inferred [529] whereon to found a criminal prosecution. But this will not deprive him of his civil remedy; for in a declaration for slander *falsò dixit* without *malitiosè* has been held sufficient. *Mercer* v. *Sparkes*, Ow. 51; Noy 35, S. C. and Moor 459, Anon. Copying a scandalous matter is according to Lord HOLT sufficient to constitute a libel, for it perpetuates the memory of the scandal; though if the copy be made by a clerk in writing an indictment, or a student a note, it is not so, because not done *ad infamiam*. *Rex* v. *Beare*, 1 Ld. Raym. 417; 2 Salk. 471; 12 Mod. 220. It is now perfectly settled that every one is answerable for the slander which he reports of another. Per† LEE, Ch. J., G. Hall, 1751; Bull. N. P. 10, Ed. 2.

With respect to the second point, it will be necessary to consider the allegation in the declaration. The libel purports to be an account of what passed in the Court of King's Bench, and it was not stated that the plaintiff and Mr. Bingham did what was there ascribed to them, but that certain things were there ascribed to them. The truth of this account therefore, not the truth of the facts stated, should have been specially pleaded in

that the charge against Waterfield was for publishing a false account of the proceedings.

† *Vid. etiam Davis* v. *Lewis*, 7 Term Rep. 17 (*ante*, p. 373).

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justification. The general issue is either a denial of the publication, or that if published by the defendant, the words are not actionable. The rule is, that where the defendant admits the publication, and that the words are slanderous, but means to justify under the occasion of their publication, he should plead that justification specially, in order that the plaintiff may have notice of the nature of the defence. *Underwood* v. *Parks*, 2 Str. 1200. This was done in *Brook* v. *Montague*, cited on the other side, where the defendant pleaded that he spoke the words imputed to him as counsel, and in *Astley* v. *Younge*, that the scandalous matter was contained in an affidavit made by the defendant in the King's Bench in his own defence. The present differs materially from the cases relied on, viz. of a mistress giving in evidence her being called on for a character of a servant, and of a friend having spoken of a tradesman's credit by way of advice; in those cases the parties uttering the imputed scandal had a duty to fulfil, which this defendant had not.

The COURT were of opinion that this action could not be maintained, but some doubts being entertained upon the bench whether the matter of justification ought not to have been pleaded, the case stood over; and no judgment was ever given.*

* See the reference to this case made by LAWRENCE, J., in his judgment on the case of *The King* v. *Wright*, 8 Term Rep. 298 (*ante*, p. 655).

BOLTON *v.* PULLER AND OTHERS, ASSIGNEES, &c.

(1 Bos. & P. 539—550.)

1796. *June* 15.

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A. B. C. and D. were partners in a banking-house at Liverpool, and C. and D. also carried on a separate mercantile concern in London; J. S. having accepted bills payable at the house of C. and D., employed A. B. C. and D. to get them paid accordingly, and agreed to deposit with them good bills indorsed by him, for the purpose of enabling them so to do; A. B. C. and D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A. B. C. and D. to C. and D. upon the general account between the two houses, and before any of the acceptances of J. S. became due both houses failed, and J. S. was obliged to pay his own acceptances; held that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A. B. C. and D. Held also, that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of C. and D. though sent by A. B. C. and D. before that event.*

TROVER for two bills of exchange; one of 4,000*l.* and one of 398*l.* 8*s.* 3*d.*

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The defendants pleaded the general issue, and at the trial before Eyre, Ch. J. at the Guildhall sittings after Michaelmas Term, 1795, a special verdict was found to the following effect: John Bolton was a merchant at Liverpool; John Forbes and Daniel Gregory, for some years, and until they became bankrupt, were co-partners, and carried on business as merchants in London, under the firm of Burton, Forbes & Gregory. On the 1st of May, 1774, Forbes and Gregory entered into partnership with one Charles Caldwell and one Thomas Smith, in the trade and business of bankers, to be carried on at Liverpool, under the firm of Charles Caldwell & Co. and so continued to trade till that house became bankrupt. The house at Liverpool had dealings and transactions with Forbes & Gregory, carrying on business as merchants under the firm of Burton, Forbes & Gregory, in London; and between the two houses in Liverpool and London, there was an open account current. Bolton for some years, and until the house at Liverpool became bankrupt, employed that house as his bankers; and they used to procure bills which had been accepted by him, payable at the house in London, to be

* Cited and followed by MALINS, V.-C., in *Johnson* v. *Robarts* (1875) 44 L. J. Ch. 465, 473.—R. C.

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there paid when they fell due. Those payments when made were carried by the house in London to their account with the house at Liverpool, and by the house at Liverpool to their account with Bolton. In the banking account between Bolton and the house at Liverpool, Bolton was made debtor for cash received of them, and for bills accepted by him payable at the house in London; and was credited in such account for all bills and cash paid by him into the said house. An interest account was kept between Bolton and the house at Liverpool, which was balanced every three months; and the latter was also allowed a profit on the said account of one-quarter per cent. on bills and cash paid, either by them or by the house in London, on their account, for the use of Bolton. Bills having been accepted by Bolton to the amount of 19,702*l.* payable at the house in London, on the 28th of February, 1793, he proposed to the house at Liverpool, that they should procure the same to be paid as they fell due by the house in London, and that to enable the house at Liverpool to provide for such payments, he should deliver to them certain other bills of exchange whereof those mentioned in the declaration were parcel with his indorsement thereon; to this proposal the house at Liverpool agreed. In pursuance of this agreement, Bolton on the 1st of March, 1793, and on other days between that day and the 16th of March in the same year, delivered to the house at Liverpool, several bills of exchange,
[*541] amounting in the whole to the *sum of 11,583*l.* 2*s.* 9*d.*; among these was the bill for 4,000*l.* mentioned in the declaration. On the 16th of March, 1793, he delivered to the same house other bills, with a check on that house (which they received as cash,) to the amount of 912*l.* 1*s.* 0*d.*; among these was the bill for 398*l.* 18*s.* 3*d.* also mentioned in the declaration. All these bills were the property of Bolton, and duly indorsed by him; the bill for 4,000*l.* having also previously to the delivery been accepted by him. On the 4th March, 1793, the bills accepted by Bolton, payable at the house in London, were by the house at Liverpool entered on the debit side of the account between them and Bolton; and the bills delivered by Bolton to the house at Liverpool, were by them carried to his credit in the same account at the times when they were respectively delivered. On the debit side

of the books of the house at Liverpool, it appeared that Bolton's acceptances, amounting to 19,702*l.* 13*s.* 10*d.* were entered thus: —"March 4th, 55 acceptances due in April, 19,702*l.* 13*s.* 10*d.*;" and on the credit side, the bills delivered to the house by Bolton were entered, some with the date of their delivery and the day on which they were to fall due, and some with the former only. On the 2nd of March, 1793, the house at Liverpool remitted the above-mentioned bill for 4,000*l.* together with other bills to the amount in the whole of 30,000*l.* and upwards, to the house in London, to be carried to the account of the house at Liverpool; and on the 16th of March, they remitted the above-mentioned bill for 398*l.* 18*s.* 3*d.* together with other bills, amounting in the whole to 8,000*l.* and upwards, to be carried to the same account. This last bill for 398*l.* 18*s.* 3*d.* was received by the house in London on the 18th of March, 1793. Some of the bills delivered by Bolton to the house at Liverpool were negotiated by them, and the value received to their own use. On the 28th of February, 1793, and from thence till the bankruptcy of the house at Liverpool, the house in London was largely in advance to the house at Liverpool. On the 16th of March, 1793, the house at London became insolvent, and on the 18th of the same month a commission of bankruptcy issued against them, under which the present defendants were assignees. On the same day the house at Liverpool also became bankrupt, and a joint commission of the same date issued against Charles Caldwell, Thomas Smith, John Forbes, and Daniel Gregory, as partners in the banking-house at Liverpool. The house at Liverpool at the time of their bankruptcy was indebted to Bolton in the sum of 2,000*l.* and upwards; and none of that parcel of bills, amounting to 19,702*l.* 13*s.* 10*d.* accepted by Bolton, payable at the house in London, were paid either by that house or by the house at Liverpool, but were paid by Bolton himself. The defendants possessed themselves of the two bills in question as assignees of Forbes & Gregory, and refused to deliver them on demand.

[542]

This case was first argued in Easter Term last by *Williams*, Serjt. for the plaintiff, and *Heywood*, Serjt. for the defendants, and a second time in this Term by *Adair*, Serjt. for the former, and *Le Blanc*, Serjt. for the latter.

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Arguments for the Plaintiff:

In the first place Caldwell & Co. at Liverpool, and Forbes & Gregory in London, are, with respect to the transactions on which this case arises, to be considered as the same persons. Secondly, the bills for which this action was brought, were appropriated by Bolton to the particular purpose of answering his acceptances at the house in London, and not paid in on the general account. Thirdly, trover is the proper form of action. First, though a separate trade was carried on by Forbes & Gregory in London, yet as they were also partners in the banking house at Liverpool, they were parties to the acts of Caldwell and Smith, and therefore the agreement made by them with Bolton was the joint engagement of the four partners, and binding on them all in law. The demands of third persons on the house at Liverpool, cannot be affected either by the distant residence of Forbes & Gregory, or by their separate concerns. Secondly, it is settled law that the property of goods deposited with a factor and not disposed of, continues in the principal, and may (subject to the factor's lien) be recovered in trover either against him or his assignees. In the present case the defendants have no lien; for the balance of account is in the plaintiff's favour. Bolton therefore is entitled to recover, unless precluded by the preferable right of the creditors of the house in London to the separate estate of Forbes & Gregory. Admitting that the bills were remitted by the house at Liverpool to the house in London on the general account, and thereby became the separate property of the latter, still, whatever rule courts of equity may have adopted in the apportionment of the joint and separate estate to the respective creditors, it has never been held in a court of law, that an action will not lie because the thing demanded has in this manner become the several property of a single partner; for private agreements made between partners, as to their claims upon each other, cannot affect the creditors of
[543] the firm. *Waugh* v. *Carver*, 2 H. Bl. 235. But this is not a question between creditors of the two houses, but an action by Bolton for the recovery of specific goods. Though, therefore, the remittance of the bills might have transmuted the property to the house in London as against the house at Liverpool, it

cannot have that effect as against Bolton. The house at Liverpool had it not in their power to negotiate these bills generally without a breach of their agreement. For it is to be observed, that the house at Liverpool were not parties to the bills which Bolton had accepted, payable at the house in London; so that these bills were not deposited with the house at Liverpool, to indemnify them against those acceptances (to which they were not liable) but to be applied specifically in their discharge. Herein consists the difference between this and the case of a banker who draws on his correspondent in favour of a customer, and takes bills as an indemnity. And by this it is also distinguished from the case of *Bent* and another v. *Puller* and others, 5 Term Rep. 494.* In that case Caldwell & Co. had made themselves liable on their drafts in favour of Bent, and had therefore a lien on the bills deposited by him: but in the present instance they had no such lien on the bills deposited by Bolton, who might if he pleased have recalled them at any time before they were applied to the discharge of his acceptances. This distinction is also supported by the case *Ex parte Dumas*, 2 Ves. 582, 1 Atk. 232, S. C. At all events the plaintiff is entitled to recover the lesser bill for 398*l.* 18*s.* 3*d.*, that not having arrived in London till the 18th of March, which was two days after the failure of Forbes & Gregory. Thirdly, if the property of these bills be in the plaintiff, trover is the proper remedy. Lord HARDWICKE, indeed, in the case *Ex parte Dumas*, seems to express a doubt upon this point, because the legal property follows the chose in action which is assigned by the indorsement. In the present case, however, the indorsement was not intended to transfer the property at all events, but only to enable the house at Liverpool to apply the bills to the purpose for which they were deposited. Now that application was not made, and therefore the property of the bills remains as if they had never been indorsed. In *Bent* v. *Puller*, if the bills had been appropriated, trover might have been maintained for them; and in *Tooke* v. *Hollingworth*, 5 Term Rep. 215,† though the Court differed in opinion on the case, no objection was taken to this form of action, and judgment was given for the plaintiff.

* 2 R. R. 654. † 2 H. Bl. 501; and 2 R. R. 573.

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Arguments for the Defendants:

First, the bills in question were paid in upon the general account between Bolton and the house at Liverpool. It appears
[544] from the special verdict, that during the intercourse between Bolton and that house, previous to this transaction, the bills lodged by the latter with the former were always paid to the general account. Had they ever been appropriated in this case, they would not have answered the object of that appropriation; for the bills accepted amounted to 19,702*l.* 13*s.* 10*d.* whereas those deposited amounted to 12,495*l.* 3*s.* 9*d.* only. Besides, it appears from the dates of the latter, that they were not to become due till after the acceptances, and therefore were not calculated either in amount or time to be employed specifically in their discharge. This transaction was merely a continuation of the general dealings between Bolton and the house at Liverpool. No particular account was either agreed upon or kept; had there been any such it must, as in the case *Ex parte Dumas*, have been distinguished by some characteristic title or appropriate mark. If the bills had been meant as a deposit, they would not have been indorsed by Bolton. They were in fact paid in with a view to swell his credit with the house at Liverpool, to a level with the large disbursements about to be made on his account. The bill for 398*l.* 18*s.* 3*d.* is not distinguished from that for 4,000*l.*; for though it was not received in London till after the separate bankruptcy of Forbes & Gregory, it was put into the post-office, and the postage paid, during the solvency of the house at Liverpool; the property, therefore, here was as effectually changed as the property of goods delivered to a carrier, which has been held to vest in the assignees of the vendee unless stopped *in transitû*. *Haswell* v. *Hunt*, cit. per BULLER, J. *Tooke* v. *Hollingworth*, 5 T. R. 231,† and *Ellis* v. *Hunt*, 3 Term Rep. 464.‡ Secondly, the house in London was distinct from that at Liverpool, and the acts of the former were not binding on the latter. Indeed, the plaintiff himself engaged the house at Liverpool to do a separate act by the terms of his agreement; the house in London being only known to him as the correspondent of that at Liverpool: at least it does not lie with him who

† 2 H. Bl. 501, 2 R. R. 573. ‡ 1 R. R. 743.

has treated them as distinct, to make them responsible as one. Though the funds of the house in London as belonging to two of the partners in the house at Liverpool be liable to the plaintiff's demand upon the latter house, yet against the assignees of Forbes & Gregory as the separate firm, this action cannot be maintained. Suppose the house in London to have consisted of four partners, two of whom were strangers to the house at Liverpool; the four would not have been liable because Forbes and Gregory were members of the latter partnership; and even if the *strangers were removed, the houses would remain equally [*545] distinct. Forbes & Gregory in their separate capacity were no parties to the agreement between Bolton and the house at Liverpool. If the latter had got the bills discounted with a third person, and sent the cash arising therefrom to London to answer the acceptances, such person might have returned the bills whether the acceptances were paid or not. The house at London stands in the place of such person, and therefore this action cannot be maintained against their assignees. The case of *Waugh* v. *Carver* only decides, that the private agreements of partners individually between each other, cannot affect the rights of creditors to sue them all upon the joint account. Thirdly, trover is not the proper remedy. It is immaterial whether the bills were indorsed in blank, or to the house at Liverpool. The object of the indorsement was to pass the property on the faith of the subsisting agreement. Had the bills been entered short in the account, they would then, according to the opinion of BLACKSTONE, J. in *Zinck* v. *Walker*, 2 Bl. 1156, have been only a deposit, and have remained the property of Bolton. In this case they were meant to be converted into cash, and therefore cannot be recalled. It has been decided, that if a man deliver money to another to buy cattle, the property of the money is in the bailee, 3 Leon. 38, Anon. So if goods be delivered to A. to pay a debt to B., A. may sell them. *Bridget Clarke's* case, 2 Leon. 30. If then the legal property passed by the indorsement, Lord HARDWICKE's opinion in the case *Ex parte Dumas* is decisive, even though the plaintiff be deemed to have an equitable lien; for though it cannot be recovered by the legal owner against one having an equitable lien, yet it has never been held that trover

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will lie against the legal owner by him who hath an equitable lien. Neither in *Tooke* v. *Hollingworth*, or in *Bent* v. *Puller*, are the bills stated to have been indorsed, nor was there any question on the nature of the remedy.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

EYRE, Ch. J. (who, after stating the case, said) :

The question is, Whether the plaintiff can maintain this action upon this case? For him it is urged, that the house in London is a house of trade, carried on by two of the partners in the banking-house at Liverpool; though it is admitted, that the trade carried on in London, is the separate estate of those two partners.

[*546] is insisted, that *the bills in their hands remained in the same state, subject to the same rules of law and equity, as would have applied to them in possession of the house at Liverpool; and that, having been appropriated (as it is called), or delivered to the house at Liverpool for a special purpose, and not having been ultimately applied to that purpose, and remaining in specie in their possession, Bolton would have been entitled to demand to have them delivered up to him by the banking-house at Liverpool, or by the assignees of that house, supposing them to have come to the hands of those assignees. I take it to be now settled, that bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy are to be delivered up, subject only to the lien, which the banker may have upon them for the balance of his account. On the other hand it is clear, that, if indorsed bills are deposited with a banker, and they are by him negotiated to a third person, though the purpose for which they were deposited should be ever so cruelly disappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover against such third person.† The present seems to be a middle case, and, I believe, is a new one. We must endeavour to ascertain to which class it belongs.

There can be no doubt, that, as between themselves, a partnership may have transactions with an individual partner, or with

† *Collins* v. *Martin*, 1 Bos. & P. 648, p. 752, *post*.

two or more of the partners having their separate estate, engaged in some joint concern, in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *e converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner, as if the partnership were transacting business with strangers; for instance—suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. In some respects therefore an individual partner, or a particular partnership consisting of two or more of those persons, who are partners in some larger partnership, may be considered as third *persons in transactions, [*547] in which the general partnership may happen to be engaged with their correspondent. On the other hand it will be difficult, if not impossible, for individual partners, or for particular partnerships composed of individual partners, to shake off privity in all the transactions of the general partnership, or to avoid all the consequences of privity. Each partner is a party, as well as privy, to the transactions of the general partnership, though the general partnership is not a party to the separate transactions of the individual partners. Forbes & Gregory were therefore parties to the agreement, which Caldwell & Smith entered into with Bolton, and were as much bound by it as Caldwell & Smith were. And I hold, that if Bolton had sued the house at Liverpool for a breach of that agreement and had recovered, he might have taken any part of the separate estate of the house in London in execution, in satisfaction of his judgment. But this will not touch the question, what shall be deemed the joint property, and what the separate property of persons so circumstanced. Joint or several, Bolton's claim upon it in the case supposed would be equally available to him.

Bankruptcy, when it intervenes, may very much change the situation of these parties. Mr. Justice HEATH suggested this consideration at the close of the first argument. It is a very important consideration.

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If all become bankrupts, all the joint and all the separate property will vest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issues against all, the assignees will take all the joint property, and all the separate property of each individual partner. In the distribution to creditors, a rule of convenience has been adopted. To understand it, we should see, what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner. But the rule of convenience, which has been adopted, restrains the separate creditor from resorting in the first instance to his debtor's share of the joint
[548] property; and also restrains the joint creditor from resorting in the first instance to the separate property of his debtor. Bankruptcy has been called a statute execution; but, if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the CHANCELLOR, who is to take order for the distribution of the effects of a bankrupt. Under the rule, the separate creditors have a right to be satisfied for their debts out of the separate property, in preference to the joint creditors. But what shall be deemed separate property, or what effect the claims of third persons upon that which (as between one partner and the partnership) would be separate property, are questions, which neither bankruptcy nor the rule of distribution seem to touch. The assignees stand but in the place of the bankrupts, and take the effects subject to every legal and equitable claim upon those effects. And therefore I conclude, that though bankruptcy very much alters the situation in which I have placed Mr. Bolton, in the course of the argument, as a creditor having obtained a judgment against the banking-house at Liverpool on the ground of this agreement; the question now made between him and the assignees of Forbes & Gregory remains undecided, and must (as it appears to me) depend on an inquiry into the effect of the privity and participation of Forbes

& Gregory in the transaction between Bolton and the banking-house at Liverpool, in which they were partners.

The true nature of that transaction has been warmly disputed in the course of the argument: but it comes out to be simply this: Bolton paid into his banker's hands these bills on his general account for a particular purpose. This has been called an appropriation; and legal consequences are deduced from thence, as if appropriation was a technical term, or at least was used in some definite or precise sense: whereas no term in popular use can be more general, or more uncertain in its import. In truth, when I say, these bills were paid in on a general account for a particular purpose, I mean only to say, that the object which the parties had in their view was, that the bankers might be enabled to provide for the payment of [549] Mr. Bolton's acceptances in London. So far from being appropriated to any particular purpose in the strict sense of the word, the bills in specie were not intended to be applied to any other purpose than to be converted into cash, in order to increase Mr. Bolton's credit with his bankers; and in the nature of things they could not be applied in specie to the particular purpose of paying Mr. Bolton's acceptances in London. These bills, at least the bills in question, were remitted to the house in London on the general account of the banking-houses. We cannot think that this was a misapplication; or that the confidence of Mr. Bolton was abused. It may be asked, assuming that Mr. Bolton considered both houses to be in full credit, was it not the very thing he meant? Was not this the probable mode by which the banking-house would be enabled to provide for the payment of Mr. Bolton's acceptances at the house of Forbes & Gregory? Then what effect can the privity and participation of Forbes & Gregory in the agreement between Bolton and the banking-house have on this transaction? which, as between the two houses, undoubtedly changed the property in these bills; a circumstance which distinguishes this case from all the cases which have been determined on this subject, and puts it out of the reach of the principle upon which the case of *Zinck* v. *Walker*, and the late case of *Tooke* v. *Hollingworth*, in the Court of Error were determined. The privity of Forbes & Gregory to the transaction at Liverpool

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rather created a demand upon them to do what they did, than to take any other course; for there is no pretence to say that it was intended that a separate account of these bills should be kept by any body. The business went on in the regular channel upon the foot of the agreement, without the least imputation upon it, up to the moment of the bankruptcy, when the adverse rights of the creditors of the two houses attached.

If up to the moment of the bankruptcy nothing affected the right of Forbes & Gregory to hold these bills on their separate account, that right must vest in the assignees of Forbes & Gregory with nothing to affect it. The assignees of Forbes & Gregory are bound to admit that Forbes & Gregory knew that Mr. Bolton's object, and that the object of the partnership at Liverpool was, that by means of these bills the acceptances were to be provided for. But how were these bills to operate as means? They were to be dealt with as the banking-house thought fit to deal with them; to be negotiated, if they thought [550] fit; to be discounted at Liverpool, if they pleased, or remitted to whom they pleased; and were necessarily to be converted into money, in order to be means effectual to the purpose even of the parties who deposited them.

If then Forbes & Gregory were parties capable of acquiring a property in these bills, as capable as any third party, and did acquire it without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house; why are not Forbes & Gregory to be considered as third persons, with whom these bills have been negotiated? If they were to be so considered, this determines the class to which I said in a former part of the argument, we were to endeavour to reduce this middle case between the case of original parties to the transaction and the case of third persons holding such bills as these in the ordinary course of the negotiation of bills of exchange.

A circumstance belonging to the lesser bill of 398*l.* 18*s.* 3*d.* was taken notice of in the argument; namely, that it came to the hands of Forbes & Gregory on the day when they became bankrupt. We are of opinion, that the bill having been remitted, as far as concerned the house remitting, before the bankruptcy,

and to a creditor, cannot be recalled, and must follow the fortune of the other bill.

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It is a great misfortune to Mr. Bolton to have been so deeply concerned with these falling houses. In such cases it too often happens that heavy losses fall somewhere. The only consolation is, that it is the law of the land, and not the caprice, or even error of any man, which can ultimately decide where they shall fall.

Our opinion upon this case is, that the judgment must be for the defendants.

Judgment for the defendants.

C. P. MICHAELMAS TERM.

LIGHTFOOT AND ANOTHER *v.* TENANT.

(1 Bos. & P. 551—558.)

1796. *Nov.* 14.

[551]

An action cannot be maintained for debt on a bond made to secure payment for the price of goods sold in order to be shipped contrary to the prohibition in the (former) statute for protection of the East India Company's trade.

DEBT on bond. The defendant [pleaded several pleas, and a verdict was found for the plaintiff on (*inter alia*) the 4th plea, the substance of which is stated in the judgment].

A rule *nisi* having been obtained for entering a judgment for the plaintiff notwithstanding the verdict, [this was argued by *Le Blanc* and *Marshall*, Serjts. for the defendant, and by *Adair* and *Shepherd*, Serjts. for the plaintiff].

[553]

The judgment of the Court was this day delivered by

[554]

EYRE, Ch. J.:

We are all of opinion, that the 4th plea is good and a sufficient bar to the plaintiffs taking anything by this application. The ground of the defence to be collected from this plea is thus opened by Lord MANSFIELD in *Holman* v. *Johnson*, Cowp. 343.

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"The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for *his sake however that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this, *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to rise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says, he has no right to be assisted." After this introduction his Lordship stated the question in that cause to be "whether the plaintiff's demand is founded upon the ground of any immoral act or contract; or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country?" And this is the question which arises between the parties to this record upon the 4th plea. The substance of this plea is, that it was agreed between the plaintiffs and the defendant that the former should sell and deliver goods to the latter, to be by him shipped in the port of London, to be carried to Ostend, to be there shipped on board ships destined to trade in the East Indies without licence from our East India Company, to be carried to Calcutta, to be there sold clandestinely; that in pursuance of this agreement, the plaintiffs sold and delivered goods to the defendant, knowing &c. and in order &c. and that in fact the goods were carried to Ostend, and shipped for Calcutta to be there sold; and that this bond was given for securing the payment of the price of those goods, and so void in law. It was agreed in the argument, that it is prohibited by the positive law of this country to furnish goods to be shipped on board foreign ships trading to the East Indies. By the 7 Geo. I. c. 21, s. 2, all contracts and agreements for the loading and supplying such ships with a cargo are declared to be void. For the plaintiffs it was contended, that the above admission must be taken with this reserve, that the prohibition attaches only on the person who has the immediate interest in the supply. I admit that the person who has the benefit of the supply is the

immediate object of the Act, the title of which is "for the further preventing His Majesty's subjects from trading to the East Indies under foreign commissions." Very probably those who are more remotely concerned in furnishing the supply, may not be directly within the scope of the Act. But it will not follow, that their contracts will be valid. Upon the principles of the common law, *the consideration of every valid contract must [*556] be meritorious. The sale and delivery of goods, nay the agreement to sell and deliver goods is *primâ facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling, will be thereby impelled to use his knowledge to make the contract more beneficial to himself, and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells; and so the illegal use may be the very gist of the contract. It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade. Such a man would not advance five pounds worth of goods which were not to be em-

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ployed in the contraband trade. It is essential to his views and it enters into the spirit of his contract that the goods shall be employed according to their destination. Doubtless the buyer of goods, having them in his possession, may divert them from the intended channel; but then he is not the honest man whom the seller of the goods took him for, and in truth he breaks his contract. This is a supposed case. But this supposed case is not immaterial to the argument; because the strength of the plaintiffs' case, as it has been argued for them, is, that supposing the transaction to have been as it is stated to have been in this 4th

[*557] plea, their share in it necessarily ended with the delivery *of the goods, and by no possibility could they have any thing to do with their future destination. By possibility most certainly the plaintiffs might be very deeply interested in the future destination, though the conduct of the speculation was unavoidably entrusted to the buyer. And a possible case of interest in the future destination is an answer to the argument that of necessity they could have nothing to do with it. But the plea having been found by the jury the counsel for the plaintiffs were driven to that argument. The proper time to insist that the plaintiffs had nothing to do with the future destination of the cargo was when the plea was before the jury; and if the truth of the case would have warranted it, the fact might have been negatived by evidence, demonstrating that the plaintiffs' part in the transaction did really end with the delivery, and that the future destination had nothing to do with their contract. They might have disproved all knowledge; indeed it was necessary that they should disprove it. Knowledge affords a strong ground to infer participation in the whole transaction. Communications of such a nature are not made unnecessarily. From the price fixed, the situation of the buyer, his ability to pay, a fair account of the extraordinary credit given to him, and other particulars, inferences of fact might have been made by the jury favourable to the ground now taken for the plaintiffs, that in fact they were not involved in any part of the transaction subsequent to the delivery; and upon this ground the jury might have been warranted in finding against the plea. But the jury having found for the plea, the Court cannot say that the plaintiffs had nothing to do with the future destination

of the goods, unless it was impossible to state a case in which he could have anything to do with it. I think it was not disputed that if the plaintiffs' contract extended to the future destination of the goods such a contract would be void. It seems therefore hardly necessary to enter into an examination of the four cases which were cited from Cowper and the Term Reports.† The result of the cases is, that knowledge, in the seller of the goods delivered, of the future destination of those goods, with the further circumstance of packing the goods in a form convenient for smuggling, will avoid the contract if sued upon here, and *à fortiori* if the seller be resident in this country. The case now in judgment is certainly not *in terminis* this case. And I use the cases only as authorities for the principle. Upon this plea, the plaintiffs do not merely assist another, they must be taken to be principals in the *illicit transaction. In that view of the case they are directly within the Act of Parliament. But if the plea had been that the plaintiffs had sold these goods to the defendant for the purpose of enabling him to trade with them clandestinely to the East Indies, that would have been a case of assistance within the scope of the authorities cited.

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[*558]

Per CURIAM: *Rule discharged.*

WAGHORNE *v.* LANGMEAD.

(1 Bos. & P. 571—573.)

1796. *Nov.* 18.

[571]

If a *fi. fa.* be *teste*'d before defendant's death, but delivered to the sheriff and executed after, the execution is regular.

JUDGMENT in this case was signed on the 23rd of May: on the 29th of the same month the defendant died, and on the 31st a *fi. fa. teste*'d previous to the defendant's death was lodged in the office of the sheriff of Middlesex: under this the sheriff levied.

Clayton, Serjt. on a former day obtained a rule to shew

† *Holman* v. *Johnson*, Cowp. 341; *Biggs* v. *Lawrence*, 3 T. R. 454; 1 R. R. 740; *Clugas* v. *Pentaluna*, 4 T. R. 466; 2 R. R. 442; *Waymell* v. *Reed*, 5 T. R. 599; 2 R. R. 675.

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[*572]

cause why the *fi. fa.* should not be set aside for irregularity, and why the money produced by a sale of the goods which remained in the hands *of the sheriff should not be restored to the administrator of the defendant. He contended, that the *fi. fa.* being lodged in the office subsequent to the death of the defendant, the execution thereon was irregular, and cited *Heapy* v. *Parris*, 6 Term Rep. 368, where the *teste* was after the death of the party; and *Walker* v. *Drawwaters*, E. 36 Geo. III. in Scacc.† where the same doctrine was held, though the *teste* was before the death of the party. He insisted also that the judgment here should have been revived by *scire facias*, since the administrator, who was a stranger in this case, was to be affected by it. In support of this he relied on *Pennoir* v. *Brace*, 1 Salk. 319,‡ where it is said by the Court, that "where any new person is either to be better or worse by the execution, there must be a *scire facias*, because he is a stranger, to make him party to the judgment, as in case of executor and administrator;" and on Lord KENYON's opinion in *Heapy* v. *Parris*. He added, that the defendant here died insolvent, leaving bond and other creditors, for whom the administrator was to be considered as trustee; and therefore, by the Statute of Frauds, the writ could only bind from the delivery to the sheriff.§

Shepherd, Serjt. *contrà*, cited *Houghton* v. *Rushby*, Skin. 257, Comb. 33, S. C.; *Springer* v. *Somerville*, Bunb. 271; and *Dr. Needham's* case, *ibid.* in the note.

BULLER, J. read a case of *Dakin* v. *Cartwright*, Hil. 12 Geo. II. K. B.|| from a manuscript note, and said that *Walker* v. *Draw-*

† See 3 Anstruth. Rep. 680.

‡ But it was also held in that case that the death of a party is not material, if subsequent to the *teste*.

§ 29 Car. II. c. 3, s. 16.

|| The case of *Dakin* v. *Cartwright* was not precisely in point; but according to Mr. Justice Buller's note, LEE, Ch. J. there said: "There was a case, Mich. 13 W. III. B. R. *Gill* v. *Parsons*. Judgment was entered between Hilary and Easter Terms, after which defendant died. Execution was taken out *teste'd* the first day of Hilary Term, and the goods in the hands of the executor were taken. And on motion it was holden, that though a judgment in respect of purchasers binds only from the signing, yet as to the party and his representatives it binds as it did before at common law, and that the execution so *teste'd* was therefore regular."

waters was decided on a misconception of what had been done in the King's Bench. He referred also to 3 P. Wms. 400, and 2 Eq. Cas. Abr. 381. WAGHORNE v. LANGMEAD.

The COURT were of opinion, that the current of authorities was against the application on the first ground, and that to make a *scire facias* necessary to support this execution, the process must appear to have issued after the death of the party: that with respect to the creditors, though the property in the goods of the deceased was not bound till the delivery of the writ to the sheriff,† yet the right *of the creditors to pursue that property till the delivery of the writ would not make this execution irregular. [*573]

Rule discharged.‡

C. P. HILARY TERM.

CHEETHAM AND OTHERS, EXECUTORS, *v.* JAMES WARD.

1797. *Feb.* 3.

(1 Bos. & P. 630—634.) [630]

If the obligee in a joint and several bond, make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors.§

DEBT on bond brought by John Cheetham, James Grugeon, Thomas Fenner, and William Ward, executors of Abraham

† The criterion of time as to title to the property was altered by 19 & 20 Vict. c. 97, s. 1; but that does not appear to affect the principle of this judgment.—R. C.

‡ *Vide etiam Parkers* v. *Mosse*, Cro. Eliz. 181, which was before the Statute of Frauds, and the following cases which were after: *Anonymous*, 2 Vent. 218; *Pennoir* v. *Brace*, 3rd Res. 1 Ld. Ray. 244; 1 Salk. 319, S. C.; *Robinson* and others v. *Tongue* and others, 2nd Res. 3 P. Wms. 399; *Lord Winchelsea's* case, note; *Ibid. Fawkes* v. *Atkinson*, Barnes, 268, ed. 3; and Tidd's Pr. K. B. 728, ed. 1, 932, ed. 2. In *Robinson* v. *Tongue* it was said that the Statute of Frauds concerns purchasers only, and not creditors; and in *Houghton* v. *Rushby*, and *Springer* v. *Somerville*, that an execution of this kind is regular under the Statute of Frauds, which extends only to creditors and purchasers, but not to executors and administrators who stand in the place of the party.

§ The principle of this judgment is cited and followed by Lord DENMAN, Ch. J. in *Nicholson* v. *Revill*

CHEETHAM v. JAMES WARD.

Cheetham, against the defendant. On oyer craved it appeared to be a joint and several bond given by William Ward (one of the plaintiffs) and James Ward (the defendant) to Abraham Cheetham (the testator) in the penal sum of 1,600*l.* conditioned for the payment of 800*l.* by the obligors, on the 24th day of December then next ensuing. The defendant pleaded "That the said William Ward mentioned in the said writing obligatory and in the condition thereof is the said William Ward one of the now plaintiffs, and not another or different person; and that after the making of the said writing obligatory, and after the said 24th day of December next ensuing the date of the said writing obligatory, and in the condition thereof mentioned to wit on &c. at &c. the said Abraham Cheetham in the said writing obligatory, and the condition thereof mentioned, duly made his last will and testament in writing, and thereby nominated and appointed the said J. C., J. G., T. F., and William Ward executors thereof, and afterwards to wit on &c. at &c. died without altering or revoking his said will, and that after the death of the said Abraham, to wit on &c. at &c. the said J. C., J. G., T. F., and William Ward duly proved the said last will and testament of the said Abraham, and took upon themselves the burthen of the † execution thereof, and that *by

[*631]

(1836) 4 Ad. & El. 675, 682; and is referred to in the judgment of STIRLING, J. *In re Wolmershausen* (1890) 62 L. T. 545, and by the same Judge in *Blythe* v. *Fladgate* (1890) 63 L. T. 546, 553.—R. C.

† When the obligee makes his obligor his executor, the latter is thereby discharged from any action on the bond, whether he administer or not. 20 Ed. IV. 17; 21 Ed. IV. 3 *b*; Plowd. 184, and agreed by all the Judges in *Wankford* v. *Wankford*, 1 Salk. 299. Whether an actual refusal to accept the executorship will prevent the discharge from taking effect or not, seems a nice point. In Hargrave and Butler's valuable edition of Co. Lit. 264 b, note 1, the latter gentleman lays it down that the debt is discharged, "whether the executor accepts or refuses the executorship." This doctrine is indeed supported by the opinion of TWYSDEN, J. in *Abram* v. *Cunningham*, 1 Vent. 303. But three of the Judges in *Wankford* v. *Wankford* (where TWYSDEN's opinion was mentioned), held the contrary to be law; POWELL, J., declining to give a decided opinion on the point. In that case also HOLT, Ch. J. made this distinction, that where the obligor is appointed sole executor to his obligee, and refuses the executorship, there his debt is not discharged, but where he is appointed executor with others and refuses, if his co-executors act, his debt is discharged; and he gives as a reason for this distinction, that his

reason of the premises the said debt in the said writing obligatory mentioned then and there became wholly extinguished in law, and the said James and William Ward then and there became and were, and still are, and each of them is wholly acquitted and discharged from the payment thereof, to wit, at, &c. and this, &c. wherefore, &c."

To this plea there was a general demurrer and joinder.

Shepherd, Serjt. in support of the demurrer :

The question on this record is, whether the obligee in a joint and several bond by making one of the obligors his executor extinguishes the debt? I admit that when the bond is joint only, and the debt is extinguished as to one co-obligor it is extinguished as to the other: and also that if it be joint and several, and a release is executed to one, it will operate as a release to both. But the release in this case is not by deed, but by operation of law: for though the obligee made the obligor his executor, it is the law which makes that act operate as a release. Now in Co. Litt. 264 b, where the diversity between a release in deed and a release in law is treated of, it is said "a release in law shall be expounded more favourable according to the intent and meaning of the parties than a release in deed, which is the act of the party, and shall be taken most strongly against himself." Where the obligee makes a co-obligor his executor, it is improper to say, that the debt of the latter is thereby released; for if it were, not only the action but the debt

refusal in the latter case is void, and cites *Lord Petre's* case, 1 Salk. 311. This reason is a strong corroboration of the notion that a refusal to accept the executorship does prevent the discharge from taking effect; for where the refusal is valid, there the release is ineffectual, and *è contrà*. It seems doubtful, therefore, whether the averment of the defendant on this record, that W. Ward took upon himself the burthen of the execution was necessary. Where indeed the obligor makes his obligee his executor, the action of the latter is only discharged by his accepting the executorship: and there such an averment would be necessary. 20 Ed. IV. 17; 21 Ed. IV. 3 *b*; Bro. Ab. Executor, 114; Plowd. 184 *b*; Sir W. Jones, 345; Wentworth's Office of Executor, c. 2, s. 5; *Rawlinson* v. *Shaw*, 3 T. R. 557, 1 R. R. 768. In this latter case it would also be necessary to aver that assets of the obligor to the amount of the debt came to the hands of the obligee, for without that circumstance it appears that his debt is not extinguished. Per HOLT, Ch. J. and POWELL, J. 1 Salk. 304, 305; and *Cock* v. *Cross*, 2 Lev. 73.

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would be extinguished. But that is not the case: for the co-obligor will be debtor to himself as executor for the benefit of the creditors and legatees, and the debt will be assets in his hands. *Dorchester* v. *Webb*, Cro. Car. 373; *Wankford* v. *Wankford*, 1 Salk. 303; *Brown* v. *Selwin*, Cas. temp. Talb. 240, 4 Brown Parl. Rep. 179; *Cary* v. *Goodinge*, 3 Brown Chan. Rep. 110.†

[*632] The action is only gone because the debtor *cannot maintain an action against himself. But though William Ward, in his personal character is unable to sue, the defendant being a co-obligor he may be able to sue him in his official character. William Ward as executor of Cheetham, may declare against the defendant, though he cannot indeed declare against himself. Had the bond been only joint, both the obligors must have been made defendants in the action, which would have prevented William Ward as executor from suing: but the bond being several he may well join himself with the other executors as a co-plaintiff in this action against one of the obligors. In the case of *Dorchester* v. *Webb*, the executrix of one of the co-obligors of a bond, having also become executrix to the obligee, was permitted in her latter character to maintain an action against the surviving co-obligor. (ROOKE, J. cited *Hammon* v. *Roll*, March 202, where A. and B. being bound jointly and severally to C. and C. having released A., it was held that B. also was discharged.) Probably the release in the case of *Hammon* v. *Roll* was by deed, and was therefore to be taken most strongly against the releasor; whereas in the present case there is only a *quasi* release, and it has been so called because it suspends the action. Cro. Car. 373.

Le Blanc, Serjt. *contrà*:

This point has been already expressly decided in very old times. The case in 21 Ed. IV. 81*b*,‡ also abridged Bro. Ab.

† See also note (1) in Hargrave and Butler's Co. Litt. 264 *b*.

‡ The case translated is as follows: "*Note*, that Copley, prothonotary, asked of Brian (Chief Justice), if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor and die, whether he who is made executor shall have an action against any of the others? And BRIAN said that he should not, for if one was discharged, all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released

Executors, pl. 118, is precisely the same as this, and in favour of the defendant's plea. It has also been established by other cases that a release of one co-obligor by operation of law, is a release of the others.† Thus in 21 H. VII. 30, it was laid down that if two be bound to a *feme sole*, and she take one of them to husband, who dies, she shall not have an action against the *other, for the duty and debt were extinguished. This last case [*633] was cited and recognised in *Sir John Needham's* case, 8 Co. 136, 3rd resolution, where it was held, that the committing of administration does not extinguish the debt, but that if the obligee make the obligor his executor, it is a release in law of the debt, because it is the act of the obligee himself. With respect to *Dorchester* v. *Webb*, the 2nd resolution there, as reported in Sir W. Jones 345, shews, that where the obligee makes the obligor executor, the debt of the latter is absolutely discharged, for the reason given is, that an action personal once suspended by the act of the party, is gone for ever. The 3rd resolution of the same case is, "if the obligee make one of the obligors executor who administers, in this case the obligor cannot sue the other obligor although he survive, and although the bond was joint and several." Indeed from the 4th resolution of that case, it also appears, that the only ground of the decision in favour of the plaintiff was, that she was executor of the co-obligor, and not the co-obligor herself. In *Wankford* v. *Wankford* it was said by POWELL, J. that a personal action once suspended by the act of the party is gone for ever, and though in some cases it may be suspended and revive again, yet never where that suspension arises from the act of the party.

to one in deed. *Copley*. Sir, the obligation is several. BRIAN. This does not matter; for a recovery against one of them and execution sued, will be a discharge to the others. And so of a discharge made to one of them," &c. This case is recognised by GOULD, J., in *Wankford* v. *Wankford*, 1 Salk. 300.

† In 21 H. VII. 29 *b*, it was held that if A. have a right of action against B. and C. jointly, and A. and B. submit all trespasses and actions, &c., to the award of arbitrators; by the award the right of action which A. has against C. will be discharged also. And in Wentworth's Office of Executor, c. 2, s. 4, it is said, that if testator make his debtor and others his executors, the debt is released; for they must all join a suit. *Vide etiam* Hargrave and Butler's Co. Lit. 232 a, note (1.) for a manuscript note of Lord Nottingham on this subject.

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EYRE, Ch. J.:

Having heard the argument in support of this plea, I am satisfied that this case may be decided in favour of the defendant on the principle now acknowledged, that where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged.† This was admitted to be the case where there is but one obligor in a bond. But a distinction was attempted between the case of a single obligor, and that of two who have become bound jointly and severally. The very point in issue was however decided in the Year Book: and BRIAN there gives a satisfactory reason for the decision. In fact there is but one duty extending to both obligors; and it was therefore pointedly put that a discharge of one, or satisfaction made by one, is a discharge of both. This puts an end to the argument that the action is not necessarily suspended as to both: for it is the effect of the suspension as to one that releases, discharges, and distinguishes the action as to both. This case, therefore,
[*634] must be decided by the Year Book, *and the principle there laid down, which has never been doubted since, whether founded in reason or not.

HEATH, J.:

I am of the same opinion. It is of no consequence whether the release be by operation of law, or by deed demonstrating the intent of the party. For when the obligee actually releases to one as matter of favour, that release affects both.

ROOKE, J.:

The general principle that if the action be once suspended in the case of a single obligor, it is gone for ever, is not now disputed: and the case in the Year Book shews that if the action be gone as to one obligor, where two have become bound, it is gone as to both. Now the obligee has it not in his power to elect to discharge one obligor without discharging the other.

Judgment for the defendant.

† 20 Ed. IV. 17, 21 Ed. IV. 3 *b*, Dy. 140, Hob. 10, Cro. Eliz. 150, Cro. Car. 373, and Sir W. Jones, 345.

CURLING AND OTHERS *v.* LONG AND OTHERS.

(1 Bos. & P. 634—638.)

1797. *Feb.* 6.

[634]

A ship bound for London after taking in her cargo, but before breaking ground was cut cut of her port of lading in Jamaica by a French privateer, but was afterwards re-captured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters: held that the owners of the ship were not entitled to any part of the freight. Though by the usage of the trade the ship was loaded at their expense.†

ASSUMPSIT for freight claimed under the following circumstances. The plaintiffs were owners of the ship *The Earl of Effingham*, and the defendants the consignees of nine hogsheads of sugar shipped on board her while lying in Salt River, Jamaica, and bound for London. The goods were put on board on the 18th of September, 1795, and four several bills of lading were duly signed by the captain. On the 2nd of December following, having completed her lading, the ship cleared out for her voyage. On the 31st of December, while waiting for convoy, she was cut out of the river by two French privateers, and carried out to sea, but was re-captured on the same day by a British schooner, and carried into Port Royal. The ship was afterwards libelled in the Admiralty Court of Jamaica, and appraised and sold under an order of that Court. The proceeds of the sale, after deducting one-eighth for salvage, were remitted to the defendants as agents for the several owners of goods on board. The whole of the cargo, including the goods in question, was brought to the ship in Salt River for the purpose of being loaded, and was actually put on board at the expense of the plaintiffs as owners of the ship according to the usage of the Jamaica trade. This amounted to 310*l.* The plaintiffs also expended 455*l.* 18*s.* according to the same usage, for the provisions and wages of the crew, between the time when the ship began to take in her loading, and the time of the capture. The plaintiffs' demand was shaped in different ways so as to recover a proportion of the freight either from the 1st of *September, 1795, when the goods were put on board to the 1st of January, 1796, when the

[*635]

† *Vide Hunter* v. *Prinsep*, 10 East, 378, 385; *Blakey* v. *Dixon*, 2 B. & P. 321; *Birley* v. *Gladstone*, 3 M. & S. 205.

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ship was re-captured, or from the 2nd of December, 1795, the day the goods were shipped, to the 1st of January, 1796, the day she was re-captured; or to recover a proportion of the sums expended by the plaintiffs as above mentioned.

The cause was tried before EYRE, Ch. J. at the Guildhall sittings after Michaelmas Term, 1796, who directed a non-suit.

A rule *nisi* for setting aside this non-suit, and entering a verdict for the plaintiffs having been obtained on a former day,

Adair and *Heywood*, Serjts. now shewed cause and contended that no freight could be claimed, there having been no inception of the voyage, which does not commence from the loading but from the time of breaking ground; that although no express case was to be found upon this subject, yet that several passages in Molloy afforded a strong implication in support of this position, as Lib. 2, c. 4, s. 3. "By the law marine chance or some other notorious necessity will excuse the master, but then he loseth his freight till such time as he breaks ground, and till then he sustains the loss of the ship;" so s. 5, "if goods are fully loaded abroad, and the ship hath broke ground, the merchant on consideration afterwards resolves not on the adventure but will unlade again, by the law marine the freight is due;" and in s. 6 it is said, that if the party agree to sail with the first wind and opportunity, "the ship departs not with the first wind and opportunity, yet afterwards breaks ground and arrives at her port, the freight in this case is become due, for there is nothing can bar the ship of her freight, but the not departure." They observed that with respect to the case of *Luke* v. *Lyde*, 2 Bur. 882, the proportion of freight there allowed was calculated from the day of sailing, and that Lord MANSFIELD explained "a rateable freight" to mean *pro ratâ itineris*; and that as here there was no "*iter*," so there could be no freight; that as to the usage of the Jamaica trade, since all the expenses incurred by the plaintiffs were to be covered by the freight, the plaintiffs could have no demand where no freight was due.

Le Blanc and *Shepherd*, Serjts. in support of the rule, argued that in a contract where part of the consideration is performed,

the party is entitled to a remuneration for such part-performance, and that in Molloy the freight only and not the loading was considered; that the right to freight *pro ratâ itineris* depends on the circumstance *of the inchoate right having commenced or not, [*636] and that this circumstance depends on the inception of the contract. They referred to the case of *Tonge* v. *Watts*, 2 Str. 1251, where LEE, Ch. J. non-suited the plaintiff in an action on an insurance for freight because "the goods were not actually on board, so as to make the plaintiff's right to freight commence," and to the observations of Lord KENYON upon that and the case of *Montgomery* and *Egginton*, 3 Term Rep. 362,† in the course of his judgment in *Thomson* v. *Taylor*, 6 Term Rep. 481, 2.‡

EYRE, Ch. J.:

This is a case of the very first impression; and it appears to me that the demand of the plaintiffs is neither warranted by the marine or by the common law. The former has settled what freight is, what services it includes, and also that it is divisible, which is contrary to the principles of the common law. At common law all the expenses of loading are included in the freight, and if the party be not entitled to freight he can demand no satisfaction for loading. The inception of freight is breaking ground.§ In the law of insurance, indeed, this doctrine is not holden so strict, for there if the goods be so situated as to create a well-grounded expectation of freight being raised, it is decided that the freight is insurable, and recoverable. But that does not affect the marine law as to freight in cases between the shipowners and freighters, by which this case must be decided. According to that law no right to freight commences till the ship has broken ground; here the ship had not broken ground, having been captured in the river. The situation of the places

† 1 R. R. 718.

‡ 3 R. R. 237.

§ Though "breaking ground" be the usual inception of freight, yet an exception to this general rule has been stated by a writer of some authority:—"In case a ship is freighted out, and in consequence of the agreement, receives her lading aboard, if an embargo happens afterwards, and her cargo is taken as forfeited, yet the owners shall notwithstanding receive the freight, as the fault was not in them, but in him whose property the goods were." Beawes Lex Merc. 87, and with this agrees the civil law. Dig. Lib. 19, tit. 2, c. 61.

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where cargoes are taken in materially varies the labour, cost, and pains taken by the shipper and master. In some places there is little difficulty and expense, in others a great deal. On these circumstances, depends the price of freight; if the master incurs this cost and trouble he takes a larger freight, if the shipper, a smaller. In either case the freight is his reward. If therefore by the marine law he be entitled to no freight, he can claim no remuneration. So stands the case by the marine law. Let us now view it upon the principles of the common law. The contract was to load these goods on board and bring them to England for a certain price. Upon this contract, how could a [*637] declaration be framed for the plaintiffs' demand either *in assumpsit,† or in an action on a charter-party?‡ Could the plaintiffs state a part-performance of the contract and insist on payment for it? This could not be done, for by the law of England the contract is entire and indivisible. By the marine law, indeed, parties may recover *pro ratâ*, if the voyage be interrupted. And by the common law where a contract cannot be performed such a meritorious consideration may arise as will sometimes entitle a party to recover in the form of an action of assumpsit for work and labour even after the contract has been broken.§ Such is the case where a ship after capture and re-capture completes her voyage; for there the shipper has his goods with the advantage of carriage, and upon that, though the original contract be gone,‖ a meritorious consideration arises which entitles the master to a recompense; not, however, on the foot of the old contract, but on a new contract which springs out of it. Here

† This agrees with the doctrine laid down in *Cutter* v. *Powell*, 6 Term Rep. 320, 3 R. R. 185, where a sailor having taken a promissory note for a certain sum from his employer on condition of performing the voyage, died before the arrival of the ship. There the Court held, that no wages could be claimed either by virtue of the contract or upon a *quantum meruit*.

‡ If one covenant for such a sum to carry goods to such a place, and being prevented by the act of God from delivering them at that place, deliver them elsewhere, and they are accepted, yet he cannot recover upon the covenant *pro ratâ*. *Cook* v. *Jennings*, 7 Term Rep. 381, p. 468, *ante*.

§ Said to be *obiter dictum*, 3 Bos. & Pull. 420; Vid. *Thompson* v. *Rowcroft*, 4 East, 47; *Beale* v. *Thompson*, 4 East, 553.

‖ This *dictum* is disapproved of by Lord ALVANLEY, Ch. J. in *Beale* v. *Thompson* (1803) 3 Bos. & P. 405.—R. C.

the ship never arrived at the port of destination, but put into a port in Jamaica, without having conferred any benefit on the freighters by the carriage, or bettered the goods in the smallest degree by the expenses incurred. I am therefore of opinion, that neither by the marine, or the common law, are these plaintiffs, however unfortunate, entitled to recover.

HEATH, J.:

This is a demand for a proportion of freight. The contract for freight is technical in its nature. By the marine law an inchoate right to freight attaches from the ship's breaking ground, and is consummated upon her arrival at the port of destination. If the voyage be interrupted the party may claim *pro ratâ*. Freight commences at the same time in all parts, since it depends on the same principle here and at Jamaica. It is true, indeed, that by the customs of different ports, duties more or less onerous, may be imposed on the master, and recompensed by the freight. But that does not vary the principle. This case is only new in its circumstances. The law of insurance does not apply to this case: for the mere hope or expectation of interest is sufficient to entitle the assured in a policy of insurance to recover against the underwriters.*

ROOKE, J.: [638]

This is a new case, and therefore I take the demand not to be founded on the usage of trade. The contract in a bill of lading is for freight. The expression is, "they paying freight;" and though the master may have been at the expense of loading, and the freight was higher on that account, yet as it had not commenced, the plaintiffs cannot demand a recompense. The text writers all agree that freight commences from the breaking ground. This is clear and intelligible: the ship begins to earn when she begins to move; and we cannot introduce new principles. The writers also say, that there may be cases where the ship-owners may be entitled to a proportion of what the ship

* To this effect see *Le Cras* v. *Hughes*, Park Insur. 269; *Crawfurd* v. *Hunter*, 8 Term Rep. 13, *ante*, p. 576; and *Boehm* and others v. *Bell*, 8 Term Rep. 154, *ante*, p. 620.

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has earned; but that cannot include what has been earned by the master before the commencement of the voyage. This doctrine is founded in good policy, for it tends to expedite the sailing of the ship. Did the freight commence sooner, it might induce the master to stay a longer time in port and so delay the voyage. Insurance is a contract of indemnity; the cases, therefore which are founded on such a contract are not applicable to this case. Upon these grounds I think the nonsuit right.

Rule discharged.

1797.
Feb. 13.

COLLINS *v.* MARTIN AND OTHERS.

(1 Bos. & P. 648—652.)

[648]

D. holds a bill of exchange indorsed in blank as agent for C.; D. wrongfully pledges it with E. E. is a holder for value to the extent of the sum he advanced; and if he took the bill without notice of the fraud he can retain the bill as against C. the true owner.*

THIS was an action of trover for two bills of exchange deposited with the defendants under the following circumstances: The bills were sent by the plaintiff to Messrs. Nightingales, his bankers, indorsed in blank, in order to be received by them when due, and to be carried to his account. In the bankers' book they were entered short: and the balance of account between the bankers and the plaintiff was in favour of the latter. The Nightingales being in want of money deposited the bills in question, among others, with the defendants, who were also bankers; and gave them an acknowledgment in writing for a sum of money received upon this deposit. The Nightingales having failed, this action was brought to recover the bills. EYRE, Ch. J. before whom the cause was tried at the Guildhall sittings after Michaelmas Term, 1796, finding upon enquiry that there was no evidence to shew that the defendants knew the circumstances under which the bills came into the hands of the Nightingales, or the situation of the account between them and the plaintiff, directed a nonsuit.

[A rule *nisi* having been obtained, the question whether the

* Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (3), Chalmers, *in loco*.—R. C.

nonsuit should be set aside, was argued by *Le Blanc* and *Palmer*, Serjts. for the defendants; and by *Shepherd* and *Heywood*, Serjts. for the plaintiff.] COLLINS v. MARTIN.

The opinion of the Court was this day delivered by [650]

EYRE, Ch. J.:

We are all of opinion that this plaintiff was properly nonsuited; and that there ought to be no new trial. I have little to add to what I stated to be the ground of this nonsuit when I made my report. The counsel for the plaintiff admitted that *the [*651] bankers might have sold these bills, but it was argued that they could not pledge them; and the case of a factor pledging the property of his principal, was urged as an authority; for it was said, that bankers have been considered as factors. In questions between bankers, or those representing them, and their customers, they have been considered to some purposes as factors or in the nature of factors; upon the same principle as in other cases, between holders of bills of exchange, and acceptors, or the first indorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the *primâ facie* consideration of a bill, the supposed value received. But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between such an acceptor or drawer, and a third person holding the bill for value. And the rule is so strict, that it will be presumed, that he does hold for value until the contrary appears. The *onus probandi* lies on the defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect that first holder. This all proceeds upon an *argumentum ad hominem;* it is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience. In strict law, and with respect to third persons, bankers do not at all resemble factors; nor will the rule that factors cannot pledge, apply to the case of a banker pledging indorsed bills. That rule is grounded on the strict rule of property; the goods are not the

COLLINS v. MARTIN.

factor's, and therefore he cannot pledge them. He may sell them, because, though they are not his, he is entrusted to sell them for his principal. He manages the sale, but it is his principal who through him sells them. For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers to be got in when due, and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him. He may sell because the property has been entrusted to him,—

[*652] and he *may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner. Perhaps the confidence reposed in bankers may be abused, and it might be wished that they could be restrained from abusing their trust. But an arbitrary restriction cannot be imposed: any restriction would possibly check the facility of negotiation. As in cases of other property we say *caveat emptor*, so in this particular case we may say to the customer who prefers to entrust his banker with his bills and his cash, rather than to be at the trouble of doing his own business, *caveat*.

Per CURIAM:

Rule discharged.

C. P. EASTER TERM.

TENANT *v.* ELLIOTT.

(1 Bos. & P. 3—4.)

1797. *May* 5.

[3]

A. having received money to the use of B. on an illegal contract between B. and C., shall not be allowed to set up the illegality of the contract as a defence, in an action brought by B. for money had and received.*

ASSUMPSIT for money had and received. Verdict for the plaintiff.

The defendant being a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies, on board the *Koenitz*, an Imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff.

Shepherd, Serjt. now moved for a rule to shew cause why the verdict in this case should not be set aside and a nonsuit entered. By 7 Geo. I. stat. 1, c. 21, s. 2, it is enacted "That all contracts and agreements whatsoever made or entered into by any of His Majesty's subjects, or any person or persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or parts in the said Act

* The test is whether the plaintiff requires any aid from the illegal transaction to establish his case. *Simpson* v. *Bloss* (1816) 7 Taunt. 246; *Taylor* v. *Chester* (1869) L. R. 4 Q. B. 309, per Mellor, J. p. 314; *Herman* v. *Jeuchner* (1885) 15 Q. B. D. 561, 54 L. J. Q. B. 340, per Baggallay, L. J., p. 564. It may be well here to refer to the more recent cases on an allied though different point, namely, the relation of principal and agent collateral to a transaction which is void (though not illegal) by statute. They are *Read* v. *Anderson* (1882) 10 Q. B. D. 100, 52 L. J. Q. B. 214, and (C. A. 1884) 13 Q. B. D. 779, 53 L. J. Q. B. 532; *Seymour* v. *Bridge* (1885) 14 Q. B. D. 460; cf. *Perry* v. *Barnett* (1885) 14 Q. B. D. 467, 15 Q. B. D. 388, 54 L. J. Q. B. 466; *Bridger* v. *Savage* (C. A. 1885), 15 Q. B. D. 363, 54 L. J. Q. B. 464; *Cohen* v. *Kittell* (1889) 22 Q. B. D. 680, 58 L. J. Q. B. 241.—R. C.

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before mentioned; and all contracts and agreements whatsoever made by any of His Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandise, treasure, or effects, or with any provisions, stores, or necessaries, shall be and are hereby declared to be void." Now the goods on board the *Koenitz* being the property of the plaintiff, a subject of Great Britain, and the *Koenitz* being a foreign ship, bring this transaction within the provisions of the above Act. In *Camden* v. *Anderson*, 6 Term Rep. 723, it was determined, that a policy effected in contravention of an Act of Parliament, made for the purpose of protecting the monopoly granted to the East India Company, was void. The voyage being illegal, makes the policy illegal also. If then the plaintiff could not have succeeded in an [*4] *action against the underwriters, neither can he recover against the present defendant. The defendant is in the nature of a stakeholder: and the plaintiff's right of action being grounded on his claim against the underwriters, he must now stand precisely in the same situation as if he had immediately sued them.

BULLER, J.:

Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over, who is entitled to it but the plaintiff?

EYRE, Ch. J.:

The defendant is not like a stakeholder. The question is, Whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The defendant took nothing by his motion.

WEBB *v.* THOMSON.

(1 Bos. & P. 5—7.)

1797.
May 6.

[5]

Sailing orders are necessary to the performance of a warranty to depart with convoy unless particular circumstances exempt the insured from the general rule.

THIS was an action on a policy of insurance, tried before Eyre, Ch. J. at Guildhall, Sittings after Hilary Term.

The policy was effected on a ship called *The Golden Grove*, Captain Hodser, bound from London to the West Indies, and warranted to depart with convoy. She sailed from Spithead, the place of rendezvous, in company with a convoy under Sir Hugh Cloberry Christian, and was afterwards wrecked on the coast of Dorsetshire.

At the trial it was proved that the captain, and a passenger on board, who was supposed to have seen the sailing orders, were drowned at the time of the ship being wrecked. The second mate being examined, as to his knowlege respecting sailing orders, stated that the captain left the ship for the purpose of obtaining them from the Admiral; and that afterwards on a signal for sailing, the captain being asked in what manner it should be answered, gave the necessary directions. But the *testimony of the mate being shaken by Admiral Christian's evidence, a verdict was found for the defendant. [*6]

Adair, Serjt. now moved for a rule *nisi* for a new trial:

This case involves two questions. 1st, whether, in point of fact, Captain Hodser ever received sailing orders; and 2ndly, whether, in point of law, the actual receipt of them be necessary to the performance of a warranty to depart with convoy. All the evidence of which the nature of the case admitted was given at the trial. The captain, whose testimony was most necessary to establish the receipt of orders, and the only other person supposed to have seen them, were drowned. Under these circumstances I submit that the Court will presume the receipt of sailing orders. The point of law has never been expressly decided. Mr. Justice BULLER seems to have questioned the necessity of sailing orders in all cases in *Hibbert* v. *Pigou*, Park

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on Insurances, p. 341, where that point had been incidentally touched upon by Lord MANSFIELD. So in *Victorin* v. *Cleeve*, 2 Str. 1250, LEE, Ch. J. and the jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy, and that those agreements were never confined to the precise words, and the plaintiff recovered.

BULLER, J. (*absente* EYRE, Ch. J.):

Had not my Lord mentioned that the verdict was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. In point of law then, the general proposition is, that sailing instructions are necessary. I have never decided this point myself, but it has often been determined at Guildhall. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert* v. *Pigou* my expression is, "It is not necessary to say whether sailing orders are essential or not; as at present advised, I do not say that they are absolutely necessary." And the case of *Victorin* v. *Cleeve* goes no further. If the captain from any misfortune, from stress of weather, or other circumstances, be absolutely prevented from obtaining his instructions, still it is a departure with convoy: but then he must take the earliest opportunity to obtain them. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with: the captain cannot answer signals; he does not know the place of rendezvous in case of a storm; he does not in effect put himself under the protection of the convoy, and therefore the underwriters are not benefited.

The other Judges concurring,

The plaintiff took nothing by his motion.

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[7] In a note, inserted in the last edition of Park on Insurances, p. 341, the following case is mentioned, which seems to agree in principle with the above decision. It was the case of *Veedon* v. *Wilmot*, at Guildhall, 1744, in the time of Lord Chief Justice Lee, where the ship insured had departed from London, and

arrived at the Downs 22nd August where the *Grafton* and *Lenox* (the convoy) were under sail, and the captain sent one of his men on board for sailing orders, which were refused; but the Commodore said, "Keep on, and I will take care of you;" and the ship being lost that night by striking on the shore, the question was, if the ship was put under convoy, having no sailing orders? and it was held she was, and the plaintiff had a verdict.

WEBB v. THOMSON.

TAYLOR *v.* SHUM AND OTHERS.

(1 Bos. & P. 21—24.)

1797. *May* 16.

[21]

There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease. *Qu.* If the replication *per fraudem* by the lessor to a plea of assignment in such a case, can ever be good? Certainly not, where the party assigning derives no benefit from the premises.

DEBT for rent against the assignees of a term.

Pleas. First, That the term estate and interest in the premises did not come to the defendants by assignment: and issue thereon. Second, that the defendants did not by virtue of any such assignment, enter into and become possessed of the premises: and issue thereon. Third, That before the rent demanded, or any part of it became due and payable, the defendants assigned to one William Bishop.

Replication. That the said supposed assignment to the said William Bishop in the third plea mentioned, was had and made by the said defendants, by the fraud and covin of the said defendants, with intent to defraud the said plaintiff of her said debt: and issue joined thereon.

[22]

The premises in question were demised in the year 1788 by the plaintiff to one Hannah Adams, for twenty-one years, and afterwards came by several mesne assignments to one Sibley; in the year 1792 Sibley mortgaged the lease to the defendants, who on his becoming insolvent, and abandoning the premises, took possession, and paid the rent up to Christmas, 1795; at which time they offered to surrender the premises to the plaintiff, and on his refusal to accept, assigned over to William Bishop: since

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that time the defendants had neither enjoyed the premises nor paid any rent: nor had Bishop taken possession, or received the lease.

This cause came on to be tried at the sittings after last Hilary Term in London, before EYRE, Ch. J., when a verdict was found for the plaintiff, with leave for the defendants to move to set it aside and enter a nonsuit.

Accordingly *Le Blanc*, Serjt. having on a former day obtained a rule to shew cause, and cited the case of *Le Keux* v. *Nash*, Str. 1221, where an assignment to a prisoner in the Fleet was held good,

Shepherd, Serjt. for the plaintiff now produced an affidavit, stating that the defendants had informed the plaintiff that William Bishop the assignee lived in Harp Lane; but that although upon inquiry one or two persons of that name were found there, yet they had no knowledge of the assignment. He admitted that the defendants might select a pauper for the purpose of assigning over to him, but insisted that there must be a good and valid assignment, so as to give the same remedy against the pauper as might have been had against the defendants, otherwise the execution would be fraudulent. That if this were not the case they might have assigned to a non-entity.

(BULLER, J.:

If they execute to a non-entity it is no assignment.)

He contended that the defendants had not legally divested themselves, for they had not made such an assignment as would bind the assignee, he never having had possession of the premises, or delivery of the lease. He cited *Philpot* v. *Hoare*, Ambl. 485, where an improper description of the residence of the assignee was one of the grounds on which the assignment was held fraudulent.

Le Blanc, *contrà*, was stopped by the Court.

EYRE, Ch. J.:

It was no part of the case at the trial that there was no such person in existence as the person described in the assignment;

the assignment was admitted on the pleadings. The real question is, whether the defendants could assign to whom *they pleased, so as to destroy their own liability. If you have no remedy against the assignee, you must lose your rent, and get possession of the premises as soon as you can. The only case in which a question of fraud could arise, is, where the assignor has kept possession of the premises, of which he makes a profit, and has made an assignment to prevent responsibility. But even there, if the possession be profitable, there will always be something on the premises for the landlord to distrain; so that I doubt whether there can ever be such a thing as a fraudulent assignment, and whether an issue on such a point can ever be well taken. It is clear that there is no fraud in assigning to a beggar,† or to a person leaving the kingdom, provided the assignment be executed before his departure. The defendants had a right to divest themselves of the interest, by the mere form of an assignment, which drives the plaintiff to take possession.

BULLER, J.:

An assignee is only liable while he continues to be legal assignee; that is, while he is in possession under the assignment.‡ I will first consider the case as it stood at the trial, and next as it stands upon the facts of the affidavit. What was to be tried? not whether an assignment had been made or not: that was taken *ex concessis;* it was admitted on the record. Where the assignor continues in possession, is the only case where the replication *per fraudem* can be good; here the defendants were clearly not in possession, and had no use of the premises; then what becomes of the issue? Secondly, has any thing appeared since the trial to shew that justice has not been done? the very reverse. Was the plaintiff taken by surprise? It is true that he has found a person of the name of Bishop, respecting whom there is some doubt, if he be the person mentioned at the trial; but the defendants have received no benefit; they offered to give up the premises, which offer was refused. The plaintiff adhered

† *Pitcher* v. *Tovey*, Salk. 81; 4 Mod. 71, S. C.

‡ *Vide Walker* v. *Reeves*, Doug. 461, in the note, and Buller's N. P. 159.

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to the strict point of law against the justice of the case; the law is against him and therefore he shall have no indulgence.

HEATH, J.:

This action is founded on the privity of estate;† but here there is none, therefore the plaintiff is not entitled to recover. So far from fraud appearing, the defendants declared their [*24] *desire of surrendering before they assigned, but the plaintiff refused to accept.

ROOKE, J. of the same opinion.

Rule absolute.

C. P. TRINITY TERM.

1797. *June* 22.

[53]

BUCK, ON THE JOINT AND SEVERAL DEMISES OF WHALLEY, CLERK, AND WIFE, *v.* NURTON.

(1 Bos. & P. 53—58.)

The word "appurtenances," as applied to a house, does not in its strict technical sense include lands usually occupied with the house.

Where a testator devised to E. for her life, and after her death to J. N. in fee, his capital mansion-house "and the lands and grounds thereto belonging and therewith held and enjoyed, with the appurtenances"; and then directed that the said J. N. (who was his steward) should hold and enjoy the said mansion-house "with the appurtenances" for one year next after testator's death; held that "appurtenances" in this last mentioned clause must be confined to the strict technical sense, and did not carry the garden and pleasure grounds which had been occupied with the house.

THIS was an ejectment to recover sixty-four acres and a half of land, consisting of a park, meadow land, pasture land, and orchards, tried before Buller J. at the last Lent assizes for the county of Somerset, when the jury found a verdict for the plaintiff, subject to the opinion of this Court upon the following case:

Edward Clarke, deceased, being seised (among other things) of the premises in question, did, by his last will duly executed, and bearing date the first day of November in the year of our Lord 1794, devise (amongst other things) as follows:

† Carth. 177.

"I give and devise unto my trusty and well-beloved friend John Nurton, of Milverton in the county of Somerset aforesaid, gentleman, (and who was acting for the testator, at his death, as his steward,) his heirs and assigns, all that messuage and farm called Blagroves, and the several pieces and parcels of land therewith held and enjoyed, situate, lying, and being in the parish of Milverton aforesaid, and now in the occupation of Jonas Chorley; also all that close, piece or parcel of meadow or marsh ground, called Great Crook, situate, lying and being in the parish of Bawdripp in the said county of Somerset, and now in the occupation of John and Richard Langdon; to hold the said messuage or tenement and farm, lands, hereditaments and premises, with their respective appurtenances, unto the said John Nurton, his heirs and assigns for ever."

Having then given certain legacies and annuities, he further gives and devises as follows;

"I give and devise unto my good friend and relation Elizabeth Whalley, wife to the said Thomas Sedgwick Whalley, (the said Elizabeth Whalley being one of the coheirs of the testator,) all that my capital mansion-house wherein I now live, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the appurtenances: and also all that my manor or lordship of Chipley, and all others my manors or lordships, messuages, farms, lands, tenements, hereditaments, and premises, as well freehold or fee-simple, as copyhold and customary, whereof I have a disposing power; except the messuage or tenement, and farm, lands, hereditaments, and premises hereinbefore devised to the said John Nurton, situate, lying, and being in the said county of Somerset, or elsewhere in the kingdom of Great Britain; to hold the same unto the said Elizabeth Whalley, for and during the term of her natural life, to and for her sole and separate use, with power for the said Elizabeth Whalley to cut and fell timber for the necessary repairs of the said premises only: and from and immediately after her decease, I give and devise my said capital mansion-house, manors, messuages, farms, lands, tenements, hereditaments, and premises, with the appurtenances, unto the said John Nurton, his heirs and assigns

[54]

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for ever: also I give, devise, and bequeath unto the said Elizabeth Whalley, all my leasehold messuages or tenements, lands, and premises, in the said county of Somerset, or elsewhere; to hold unto the said Elizabeth Whalley for so many years of my term, estate, and interest therein as shall run out and expire in her lifetime, to and for her own sole and separate use and benefit: and from and immediately after her decease, I give, devise, and bequeath the same leasehold messuages, or tenements, lands, and premises unto the said John Nurton, his executors, administrators, and assigns, for all the residue of my term, estate, and interest that shall be therein then to come and unexpired. And it is my express will and desire, and I do hereby direct, that the said John Nurton shall hold and enjoy my said capital mansion-house, with the appurtenances, for the space of one year next after my death. I give, devise and bequeath unto the said Thomas Sedgwick Whalley, in case he shall survive his wife, the said Elizabeth Whalley, the sum of 1,000*l.* to be issuing and payable out of the estates hereinbefore devised to the said Elizabeth Whalley for life, and to be paid by the said John Nurton at the end of twelve calendar months next after her death. All the rest, residue, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, after payment of all my just debts, funeral expenses, and legacies hereby given, I give, devise, and bequeath unto the said John Nurton, his executors, administrators, and assigns. And I do hereby make, constitute, and appoint him, the said John Nurton, whole and sole executor, of this my will, hereby revoking all former wills by me at any time heretofore made; and do make and declare this to be and contain my last will and testament."

[55] The testator died on the 28th of March, 1796, having for many years previous to and at his death constantly occupied all the premises above mentioned, (which were enumerated in a schedule prefixed to the case,) with his said capital mansion-house, and the gardens and pleasure-grounds of Chipley; which include the parlour-garden, the herb-garden, the pond-garden, the old house-garden, the arbour-garden, the shrubbery, the

lime-tree grove, and a court adjoining, and the public and private walks or road-ways, one of the latter of which was through the park to Chipley House, besides a back court, and other curtilages.

The question for the opinion of the Court was, Whether the lessors of the plaintiff, or any of them, were entitled to recover all or any, and what part of the above-named premises; and whether they, or any of them, passed to John Nurton by the clause which directs that he is to have the mansion-house, with the appurtenances, for a year after the testator's death?

Le Blanc, Serjt. for the plaintiff [cited Bro. Abr. Feoffment of Lands, pl. 53; *Bettisworth's* case, 2 Co. 32; *Hearne* v. *Allen*, Cro. Car. 57, Hutton, 85, S. C.]

Williams, Serjt. for the defendant: [56]

It is manifest from the will, that every thing was meant to pass. If that intent can be shewn, it is admitted that the words are large enough. But some cases may be cited, to shew that *ex vi termini* more will pass by the word "appurtenances" than has been stated on the other side. In *Higham* v. *Baker*, Cro. Eliz. 16, ANDERSON, Ch. J. says, "That land shall pass as pertaining to a house which hath been occupied with it by the space of ten or twelve years; for by that time it hath gained the name of parcel, or belonging, and shall pass with the house by that name in a will or leases." The same doctrine is laid down in *Loft* v. *Baker*, 2 Rolle's Rep. 347. So by the case of *Yates* v. *Clincard*, Cro. Eliz. 704, it appears, that lands may pass under the words, "house, with the appurtenances." In *Boocker* v. *Samford*, Cro. Eliz. 113, a devise of a "tenement, with the appurtenances, in which H. B. dwelleth in Ebley," was held to pass lands out of Ebley, which had been used with the tenement by the space of sixty years, and had always passed by one grant, and under one rent. And in the present case the lands in question had been for many years constantly occupied with the house. The strongest case in favour of the plaintiff is *Smithson* v. *Cage*, Cro. Jac. 526; but that was a case of surrender of copyhold, which is construed as strictly as a deed. But even there the orchards were held to

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pass. By *Hill* v. *Graunge*, Plowd. Com. 170, it appears that the terms "appertaining to the messuage" may, even in a deed, signify lands usually occupied with the messuage.† As to the question of intent, it has been said, that if the testator had [*57] *meant the lands to pass, he would have described them; and the circumstance of the description being inserted in the former clause, and omitted in the latter, has been relied on. But the words, "house with the appurtenances," in the directory clause, refer to the former description, and shew that the defendant should take in the same manner as E. Whalley. The cases of *Doe* v. *Collins*, 2 Term Rep. 498,‡ and *Blackborne* v. *Edgley*, 1 P. Wms. 600, prove that very little is sufficient to pass lands occupied with the house, where it appears to have been the intention that they should pass.

Le Blanc in reply was stopped by the Court.

EYRE, Ch. J.:

I have no doubt upon the case, unless it be with respect to the orchards. Lands will not pass under the word "appurtenances" taken in its strict technical sense: they will pass if it appears that a larger sense was intended to be given to it. If the Courts had always adhered to this line of construction, many reported cases would not now disgrace the books. Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in *Hobart*,§ there be demonstration plain of an intent to use them in a different sense. In the former part of the will there is a devise of a house with lands in terms express, to which is added, "with the appurtenances," in order to comprise all which might not fall within the description. Then follows a declaration that the defendant shall have for one year something which was included in the

† Land may be said to be appertaining to an house, as well in the King's case, as of a common person, where it hath been let and occupied together by a convenient time. *Jennings* v. *Lake*, Cro. Car. 168. *Vide etiam* Co. Entr. 384; Dyer, 362.

‡ 1 R. R. 529.

§ Hob. 33. The note is—No man shall shew me a case in law, where by purchase by devise to an heir, any may take that is not heir indeed, without declaration plain.

above devise. The testator must be supposed to have understood what he was talking about. If he had intended to have given the whole, the words were before him, and he ought to have used them. Suppose there had been nothing stated to let us into the intention of the testator, but the mere devise to the defendant, we must have examined what was occupied by the testator; and if we had found a house situated in a park which had always been occupied with it, and was, as it were an integral part of the thing, this might have proved the intention of the testator to pass the whole together. There, if nothing to the contrary had appeared, we might have supposed the testator to have used the word "appurtenances" in a sense different from its technical sense. But this is not that case. It is true that the premises were occupied for a considerable time together with the house: but first, the whole of the premises are not necessarily connected; in the next place, there is here solid ground to argue, that the testator *understood the meaning of the words employed in the devise, having sometimes used the word "lands" as a part of the description, and sometimes dropped it. The defendant being the testator's executor, and having been his steward, affords a fair ground of argument. The testator gave him the exclusive enjoyment of the mansion-house, "with the appurtenances," for one year only, after having devised the mansion-house and lands also "with the appurtenances," to Mrs. E. Whalley for her life, with remainder to the defendant. Now with what view was this done? Most probably for the convenience of the defendant in the execution of the duty imposed upon him. The general intent, therefore, as collected from the devise, and the relation in which the devisee stood to the testator, does not call upon us to go beyond the strict rule in construing the technical word "appurtenances."

[*58]

HEATH, J.:

I am of the same opinion. We ought to adhere to the strict technical sense of the word "appurtenances." For though the intention is not clearly expressed, why the defendant should have the mansion-house at all, yet it appears, that he was executor and residuary legatee; and as such was entitled to the

BUCK v. NURTON.

stock, the arrears of the rent, the furniture, &c. A year's occupation therefore was given him, to settle his accounts, and collect what belonged to him. He ought to have the house, and what comes within the strict sense of the word "appurtenances." Besides, this may be distinguished from the cases cited, for it is a separation of the premises for a year only, whereas in some of the other cases it was for a great length of time, and in some perpetual, which might induce the Court to lean against it.

ROOKE, J.:

I am of the same opinion.

The postea to be delivered to the plaintiff for all the premises except the orchards.

C. P. MICHAELMAS TERM.

1797.
Nov. 8.

HICKS *v.* RICHARDSON.

(1 Bos. & P. 93—94.)

[93]

If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration and of making the submission a rule of Court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may enforce payment of the moiety from the other, as if the award had ordered payment of it to the former party.

THE parties in this case having submitted to arbitration, and the submission having been made a rule of Court, the arbitrator awarded 10*s.* 1*d.* as the balance due to be paid by the defendant to the plaintiff, each party to pay his own costs of suit, a moiety of the costs of the arbitration and of making the submission a rule of court, and to execute a release to the other party. After notice of the award made, the defendant, in order to get it out of the hands of the arbitrator, paid the whole expense of the arbitration; then tendered the sum awarded, together with a release to the plaintiff, and called upon him to pay a moiety of the expense of the arbitration and of making the submission a rule of court, and to execute a release on his part; this the plaintiff altogether refused.

A rule *nisi* for an attachment against him for not performing the award having been obtained by the defendant,

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Williams, Serjt. shewed cause, and contended, That it was not competent to the defendant to pay the whole expense of the arbitration, and then apply for an attachment against the plaintiff for non-payment of his moiety; but that he ought to resort to another remedy.

Le Blanc, Serjt. in support of the rule.

EYRE, Ch. J.:

We shall accommodate the form to the substance of the thing, if we are satisfied that the plaintiff has refused to pay his moiety of the costs. Shall we oblige the arbitrator to bring an action? Should we not have allowed him to say on this sort of application that the costs of the arbitration amounted to so much, and that by the terms of the award they were to be paid by both parties, and that this plaintiff had refused to pay his moiety? I consider this motion in the same light as if the arbitrator had come to enforce the attachment. On the substantial justice of the case, the plaintiff is bound to pay his moiety of the costs. He has submitted by a rule of court to pay them, and the Court will enforce the payment by attachment. It is all matter of form whether the arbitrator himself applies for the attachment or the party who has paid the money to the arbitrator. I cannot but think that it was the better course to be taken in this case, for the arbitrator to get the whole costs from *the defendant by withholding the award, who may redress himself by one attachment, than for the defendant to have an attachment against the plaintiff for not obeying the award as far as concerned him, and then for the arbitrator to have an attachment against him, for the moiety of the costs of the arbitration. What a scene of litigation, expense and vexation might this strictness produce? Supposing no objections to the expenses themselves, I think the attachment should issue.

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BULLER, J.:

My doubt is this. The money has been advanced voluntarily,

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and without application from the plaintiff, and the defendant comes for an attachment as grounded on the award. Being a mere voluntary payment on the part of the defendant, I doubt whether the plaintiff is strictly liable to an attachment. Suppose the arbitrator had awarded the expenses of the arbitration to be paid by the parties jointly and not severally.—However, I am perfectly satisfied that no injustice will be done; the plaintiff is certainly bound to pay some way or other: if therefore the Court are inclined to grant the attachment, I shall not oppose it.

HEATH, J.:

I cannot consider this as a mere voluntary payment of money, since the defendant could not have got the award out of the hands of the arbitrator till all the expenses were paid.

ROOKE, J.:

It is clear that one man cannot pay the debt of another officiously. But in this case there is one circumstance on which I lay great stress. It was necessary to make the submission a rule of court; at least the attachment is right to enforce the payment of half the expenses of that proceeding. I do not like attachments on equitable grounds, and I think that the Court should be very strict in granting them. But since there is a legal ground as to part, and as it is the opinion of the Court that no injustice will be done, I shall not oppose the attachment.

EYRE, Ch. J. added, that perhaps on strict legal grounds the arbitrator ought to have applied for the attachment to enforce payment of the costs of the arbitration, but that he was unwilling to force arbitrators to come into court.

Rule absolute.

JEYES, ONE, &c., *v.* BOOTH.

(1 Bos. & P. 97—98.)

1797. *Nov.* 11.

[97]

If a defendant in custody being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney; the Court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney.

ADAIR, Serjt. obtained a rule calling on the plaintiff to shew cause why the judgment entered up, and the *ca. sa.* issued in this case should not be set aside with costs, on an affidavit stating, that the judgment was entered up on a warrant of attorney executed by the defendant, when in custody in the Fleet Prison, he having no attorney present on his behalf.

The facts were these: The defendant being in custody for the debt of a third person, but being supersedable, was informed, that if he was superseded, he would be detained at the suit of the plaintiff, who was an attorney: upon this he sent for the plaintiff, who by his direction prepared the warrant of attorney in question; the defendant took it into his hand, read it, and was proceeding to execute it, when the plaintiff informed him that he must have an attorney on his part present at the execution: accordingly the defendant went into another part of the prison and brought with him a person, who being asked by the plaintiff whether he was an attorney, answered in the affirmative; he was then desired to explain the nature of the instrument to the defendant; and the *warrant was executed in his presence. It turned out afterwards that this person was not an attorney, but only a clerk to an attorney.

[*98]

Le Blanc shewed cause and contended, that where a party produces a person as an attorney who in fact is not one, that party shall not be allowed to turn a plaintiff round by saying that the warrant of attorney is not, on that account, properly executed.

EYRE, Ch. J.:

If on the plaintiff objecting, that the warrant must be executed

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in the presence of an attorney on the part of the defendant, the defendant accepts the instrument, and takes upon himself to find out the person in whose presence he ought to execute it, the Court will not, for the purpose of such a motion as this, doubt that such person was an attorney. The present application is founded on an attempt to cheat the plaintiff.

Per CURIAM:

*Rule discharged with costs.**

1797. *Nov. 27.*

SPARENBURGH *v.* BANNATYNE.

(1 Bos. & P. 163—172.)

[163]

A native of a foreign state in amity with this country, taken in an act of hostility on board an enemy's fleet, and brought to England as a prisoner at war, is not disabled from suing while in confinement, on a contract entered into as a prisoner at war.

ASSUMPSIT for wages due to the plaintiff as a seaman.

[The issues raised by the pleadings sufficiently appear from the facts and judgments as below stated.]

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This cause was tried before Eyre, Ch. J. at the Guildhall Sittings after last Trinity Term, when it appeared in evidence, that the plaintiff, being a native of Oldenburgh in Germany, was taken prisoner at the Cape of Good Hope, he then serving as a sailor in the Dutch Fleet under Admiral Lucas; that he was sent from the Cape to Saint Helena, in a British frigate, as a prisoner of war, and was there put on board the *Caledonia*, a British merchantman, then in great want of hands, by order of the governor of the place; that during the voyage from Saint Helena to England he was treated like the rest of the crew, and did his duty to the satisfaction of the captain, the defendant in the action; that on his arrival here he was taken over to the commissary with the other prisoners taken on board the Dutch fleet, and was at the time of the action brought in custody as a prisoner of war. Verdict for the plaintiff, 24*l.*

Shepherd and *Heywood*, Serjts. on a former day, moved for

* See *Hutson* v. *Hutson*, 7 T. R. 7; p. 367, *ante*, and note.

a rule to shew cause why the verdict should not be set aside, and a new trial be had; which was granted by the Court, after some hesitation.

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Marshall, Serjt. now shewed cause:

First, the plaintiff being a German born is not an alien enemy within the legal acceptation of the term. * * Secondly, Supposing the plaintiff a native of Holland, and taken in actual hostility to this country, yet under the circumstances of the case he is entitled to recover. Having entered into a contract with the license of the King's officer, that license may be presumed to have been given with the King's permission; and a license to contract, necessarily implies a license to sue. The plea of alien enemy is not now favoured by the courts. * * The reason at this day for the disability of an enemy is, that he shall not recover effects which, being carried from hence, may enrich his country: and it has been holden, that the subject of a power at war, who came here before the war broke out, or who comes here even in time of war, with the King's permission, may maintain an action. *Wells* v. *Williams*, 1 Salk. 46, Lord Raym. 282. The disability is now confined to two cases, viz. where the right sued for is acquired in actual hostility, *Anthon* v. *Fisher*, Dougl. 649, n.; and where the plaintiff being an alien enemy is resident in the enemy's country. *Brandon* v. *Nesbit*, 6 T. R. 23, 3 R. R. 109; *Bristow* v. *Towers*, 6 Term Rep. 35. Thirdly, This defence is founded on an idea of a right in the conqueror to reduce his prisoners to slavery, which is contrary to the law of nations. * * If it be said that the plaintiff has made himself an enemy by his own act, the answer is, that a person who owes no natural allegiance to the power at war with us, may by his own acts cease to be an enemy and become *a friend; his character of enemy continuing no longer than while he adheres to the enemies of the King. [165] [*166]

Shepherd and *Heywood*, Serjts. in support of the rule:

Notwithstanding the language of the entries, there is no ground afforded by any of the text writers for supposing that the disability of an alien depends upon his birth. In Co. Litt. 129 b,

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an alien enemy is spoken of as "a subject to one that is an enemy to the King," not as a native of the country at war. Nor in the following books, Theloall's Dig. l. 1, c. 4; 1 Black. Com. 372; Terms de la Ley, 36; Fost. C. L. 185, H. P. C. 164, which treat of alien enemy, is any mention made of birth. * * The present plaintiff, when he accepted a commission from the Dutch Government, (for the commission of the ship is his commission,) became a subject of Holland, owed allegiance to Holland, and was liable to be prosecuted for the breach of it as a traitor. If then the plaintiff ever became a subject of Holland, the next question is, how far that character has been altered by subsequent events? A prisoner at war must be considered as much the subject of the country from which he was taken, as when he was in actual service; and his detention is justified on no other principle than that of preventing such
[167] country from having the benefit of his service again. * * It is said, Vattel, l. 3, c. 15, s. 230, that "volunteers taken by the enemy are treated as if part of the army in which they fight." The reason why no other plea is to be found in the entries than that of alien enemy *née*, is because no other person coming under the description of alien enemy could be resident here. * * The only remaining question relates to the license of the officer. The act of an individual can no more remove the disability of an alien enemy to contract, than it can create the character of alien enemy. Bro. Abr. Denizen, pl. 20. * *

EYRE, Ch. J.:

The question is, Whether on the evidence produced in this case the plaintiff is to be considered as an alien enemy at the time when the writ issued? If he must be so considered, I take it to be a necessary consequence that this action must fail. The fact is, that this man, being a native of some part of Germany, and therefore a neutral by birth, was found on board a ship belonging to the enemies of this country, and was captured in actual hostility. What then is his situation? Having been taken in the act of hostility, he is either a pirate, or *quoad* that act of hostility a subject of the prince or power under whose commission he acted. No doubt, this man being a neutral by

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birth committed an act of hostility against this country, under a commission from a state at war with this country. So far I take to be clear. I therefore go a great way with the defendant's counsel, who have argued that at this day the form of the plea of alien enemy, which states the party to be alien enemy born, is not absolutely necessary to be adhered to in exclusion of every other case of enmity. In the course of the argument we have had many reasons and authorities adduced to shew, that if a man is really to be considered as alien enemy, though not a native of the country at war, he is so to be considered as to all the consequences which apply to alien enemy by birth. But here the plaintiff became an enemy in consequence of having participated in one single act of hostility. Now suppose it had been the pleasure of this state to shew him favour. Suppose this had been said, "You are a neutral, and perhaps have been drawn into the act in which you were engaged: you are at liberty to return to your own country, or you may remain here, as you are the subject of a prince in amity with us." It has been admitted in argument, that as soon as he should become *sui juris*, the character of enemy would be purged. If then the Crown had not thought fit to hold the plaintiff prisoner at war, he could not have been considered as sustaining the character of enemy, but would have been treated as the subject of a state in amity with this country. The difficulty of the case, if there be difficulty, arises from the plaintiff having been detained as prisoner at war: it has been contended that if, at the moment of capture, he was alien enemy, that character must continue till he ceases to be prisoner at war. That part of the argument I never was satisfied with; I cannot deny that he was captured as alien enemy; at that moment he was so: but how came he to be so? Not in consequence of any permanent character of enemy, but because he had joined in one act of hostility, for which act he is not, according to the rigour of ancient war, put to the sword, or delivered into the hands of the individual who took him prisoner, to be kept prisoner by him, till he should receive the ransom; but he remains in the hands of the king till he is ransomed by an exchange for the benefit of the state, or set at liberty by the king's command. But how does this tend to fix on him the

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permanent character of an alien enemy? That character arises from the party being under the allegiance of the state at war with us; the allegiance being permanent, the character is permanent, and on that ground he is alien enemy, whether in or out of prison. But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy; he can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us. When the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us; it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of
[169] war, how does he differ from any other individual who is in custody for an offence which he has committed, and for which he is answerable? Captain Vaughan * was not an alien enemy, but being a natural born subject of this realm, he became a traitor; for that he was put in prison, for that he answered, and with his life. But it was for that act of hostility merely. With regard to his character of a subject, he remained, till the moment of his execution, as if that act had never been committed. There is very little light to be procured from our books, to assist us in our inquiry, how far a neutral joining in an act of hostility is to be considered as having acquired the character of alien enemy. The subject was indirectly discussed in the case of Captain Vaughan to which I have alluded. He was charged in the indictment † with adhering to the king's enemies, by cruising *cum subditis Gallicis*; the fact was, that many of his crew were not natural born subjects of the French king, but Hollanders. It was made a question whether the Hollanders could be called *subditi Gallici*; and though the point was not authoritatively decided, because some of the crew were certainly French, which was sufficient to support the indictment, yet it was held by HOLT, Ch. J. and agreed to by the rest of the Court, that the Hollanders by accepting a commission from the French king became *subditi Gallici* and so remained, during the continuance of their service, in a state of qualified subjection, arising out of

* 5 State Trials, p. 17, No. 162. † See 6 State Trials, Appendix.

the service and determining with it. This, had it been the very point in judgment, would have gone a great way towards deciding the present question. The commission under which the plaintiff, being a German, acted, was put an end to by the capture of the frigate in which he was. After that time he had no opportunity of continuing in the service of the state of Holland; and his temporary character of alien enemy ceased and determined with the authority under which he acted. Captain Vaughan's case, as far as it goes, draws a line, and fairly marks out when that character begins, and when it shall end. I am of opinion that it is determined by the very nature of the subject, and being so determined, why should we desire to enlarge the disability of the plaintiff, or continue it, until the war is concluded? Why, but in order to let in one of the harshest, one of the most impolitic, nay immoral defences that ever was set up in a court of justice? This man, whether he was under a safe conduct or not, did his duty faithfully, and was duly approved of by the officer of the *Caledonia*. That ship was in such distress, that she was, as it appeared at the trial, under the necessity of taking in more hands at Lisbon, and probably [170] would have been lost without such assistance as was afforded by the plaintiff. He now only asks for a moderate reward, and is paid with a plea of alien enemy. This is certainly one of the hardest cases I ever knew, and I think we ought to lean against it. And if a distinction is to be found between the permanent character of alien enemy, to which the Courts of justice cannot give protection, and the temporary character, we shall readily adopt it. As to the ground of policy which has been taken in argument for the defendant, namely, that a benefit would result to the enemy from the plaintiff's recovering; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is

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the case of an outlaw. Modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our courts of justice. It is not therefore good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience. As the real justice of the case is with the verdict, and a legal distinction to exclude this unworthy defence can fairly be maintained, I think no new trial should be granted.

HEATH, J.:

I am quite of the same opinion with my Lord, and I am glad that some legal ground can be found, on which we may repel this dishonest defence. I will first consider, Whether in a plea of alien enemy, it is necessary to state that the plaintiff is alien enemy by birth? The forms of pleading have always been considered as strong evidence of the law, and it is said that they all aver that the party was born in the country at war with us. But I observe that in 4 Mod. 405, where the plea was "*alienigena in regno Franciæ sub ligeantia adversarii domini regis, &c. oriundus*," exception was taken on demurrer that it ought to have been *natus*, and some precedents being cited out of Rastall, where the word "*natus*" was supplied by "*oriundus*," the plea was held good. Next as to the general question, the pleas state
[171] that the plaintiff was adhering to the King's enemies; they must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection from the King. If he conspires against the life of the King, it is high treason; * if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostilility. It has been said, that a prisoner at war cannot contract; his case would be hard indeed if that were true. Officers on their parole must subsist like other men of their own

* Peter Molierco, a French prisoner, was indicted for privately stealing in a jeweller's shop. Sir Michael FOSTER thought it improper to proceed capitally against him upon a local statute, and directed the jury to acquit him of privately stealing, but to find him guilty of simple larceny. Fost. 188.

rank; but according to such doctrine they must starve; for they could gain no credit if deprived of the power of suing for their own debts. It has also been urged, that if the plaintiff was under a protection, that circumstance ought to have been pleaded, and this is true of a formal protection under the great seal; but there may be a protection arising from situation, which need not be pleaded. If a prisoner of war is in confinement, he is protected as to his person; if he is on his parole, he requires further protection than what relates merely to his person. The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted. I will add one case to shew that a prisoner at war may sue and be sued. The son of the celebrated Mississippi Law was brought over here as a prisoner at war, and being on his parole was arrested for 10,000*l.* by the executor of a creditor, who swore that he was indebted as appeared by the testator's books; he was discharged however, not because he was a prisoner at war, but because the executor had not inserted in his affidavit that he was indebted "as he believed." If a prisoner of war can be sued, there is no reason why he should not sue. How is it with felons? They may be charged in execution, and yet their bodies are at the King's disposal. For these reasons I think the plaintiff, being a prisoner at war at the time of making the contract, may maintain an action on that contract, and is protected by law.

ROOKE, J.:

This question does not come before us upon demurrer, but on the single point whether the issue is rightly found. The defence has no foundation in conscience, in justice, or in public policy, and I do not feel disposed to assist it. An enemy under the King's protection may sue and be sued: that cannot be doubted. A prisoner at war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his *parole is possessed of a ring or a jewel of great value, on [*172] which he wants to raise money, and that a tradesman is so dis-

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honest as to receive it from him, and refuse either to advance the money or return the pledge. Surely the Court would say that he might recover his ring or his jewel from the tradesman. The present plaintiff has in fact done much the same thing. Under the licence of the King's officer he pledged his labour at St. Helena, in order to procure a more comfortable subsistence. Accordingly he worked his way over, and earned a reasonable compensation. That being the case, I see no reason why he should not recover, even if he were alien enemy born. But as my Lord has not thought proper to go so far, I speak to that point with diffidence; and shall rather avail myself of the distinction which has been drawn between the temporary and permanent character of alien enemy; laying in a claim however, to say, at any future day, that a person in the situation of the plaintiff is like the officer who pledges his jewel; for this contract was made under the licence of those who had authority to license the contracting party.

Rule discharged.

C. P. HILARY TERM.

BULL *v.* TILT.

1798. *Feb.* 1.

(1 Bos. & P. 199—200.)

[199] A pardon, if pleaded, must be averred to be under the great seal.

ASSUMPSIT for wages.

Pleas. 1st, Non-assumpsit. 2ndly, That the plaintiff before the time of the action commenced, was convicted of felony, and sentence of transportation passed upon him.

Replication joining issue on the first plea. As to the 2nd plea, "that after the said conviction of the plaintiff, and after the giving of the said judgment in the said plea mentioned to have been given against him as aforesaid, and before the suing forth of the original writ of the plaintiff in this behalf, (to wit,) on, &c. at, &c. our sovereign lord the now King, in consideration of the

opinion of the judges of our said lord the King in the plaintiff's behalf, was graciously pleased to extend his gracious mercy unto the plaintiff, and did then and there grant the plaintiff his said Majesty's free pardon for the said crime, of which the said plaintiff was so convicted, as in the said plea is mentioned. And this, &c. Wherefore, &c."

To this there was a special demurrer, "for that the said plaintiff hath not in or by his said replication alleged or shewn in what manner the supposed pardon therein mentioned was granted, or that the same was under the great seal of Great Britain; and also for that the said plaintiff hath not in or by his said replication set forth or shewn the letters patent, if any, by which the said pardon was granted, or brought the same into court here; and also for that the said replication is, in other respects, uncertain, insufficient, and informal."

Joinder in demurrer.

Kirby, Serjt. being called upon by the Court to support the replication, contended, that although the case of *The King* v. *Beaton*, 1 Bl. 479, was an authority to shew that a pardon is not good unless under the great seal, yet that it did not prove the necessity of averring that circumstance; but on the contrary, that it must be implied from the plaintiff's averment of his having received a free pardon, that it was under the great seal, since no other pardon is good.

EYRE, Ch. J.:

I take it that everything under the great seal must be pleaded *sub pede sigilli*, and that a pardon must be under the great seal is clear. However, that this may not be taken too *generally, I [*200] think it right to mention that under some statutes the King's sign manual actually carried into execution, and the conditions performed, may amount to a statute pardon. But those are exceptions not at all affecting this case.

Per CURIAM: *Judgment for the defendant.*

Palmer, Serjt. for the defendant.

1798.
Feb. 6.

DRISCOL *v.* PASSMORE.

(1 Bos. & P. 200—205.)

[200]

Insurance on a voyage from C. to D. on a representation that the ship was first to sail from A. to B. and from B. to C.; the voyage from A. to B. was performed, but that from B. to C., being unavoidably prevented, the ship returned to A., from thence proceeded immediately to C., and in performing the voyage from C. to D. was lost; and this was held a good commencement of the voyage insured.

ASSUMPSIT on a policy of insurance, with a count for money had and received. The defendant paid five guineas into Court.

[201] The ship *Timandra* being about to sail on a voyage from Lisbon to Madeira, from Madeira to Saffi on the coast of Africa in ballast, and from thence back to Lisbon, with a cargo of wheat; the plaintiff directed his broker to make three insurances, viz. one on three-fourths of the ship for the round voyage, one on three-fourths of the freight on the voyage from Lisbon to Madeira, and one (which was the insurance in question) on three-fourths of the freight from Saffi to Lisbon.—The two former were effected without any difficulty, but the broker was not able to get the third underwritten at the same time, on account of the distant period at which the risk was to commence: however, on a representation some time afterwards, that he had received intelligence of the ship's arrival at Madeira, and that she was about to proceed on her voyage immediately, this also was effected. When the *Timandra* arrived at Madeira, all the crew except two, being alarmed by reports of some Moorish cruisers being off Saffi, and of their having captured and ill-treated a Dane and an American, quitted the ship, and refused to return to it unless the captain would promise to sail immediately for Lisbon. Under these circumstances, the captain carried the ship back to Lisbon; but on his arrival there, the charterers insisted on his proceeding directly from thence to Saffi; which he accordingly did, and was captured in his return from Saffi to Lisbon. It was in evidence that the difference of season arising from this delay did not vary the risk.

This was tried before Eyre, Ch. J. at the Guildhall sittings after Trinity Term, when a verdict was found for the plaintiff.

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A rule having been obtained in Michaelmas Term, calling on the plaintiff to shew cause why the above verdict should not be set aside, and a new trial be had, on the ground of the voyage insured never having commenced.

[The question was argued by *Shepherd*, Serjt. for the plaintiff, and *Adair* and *Le Blanc*, Serjts. for the defendant.]

EYRE, Ch. J.: [203]

At the time of the trial, I had considerable doubts on this case; but the discussion of to-day, and the opportunity which I have had of further considering the question, have in a great degree cleared them up. If I had continued to doubt I should be unwilling to interfere with a verdict of a special jury of merchants on a subject of this kind, unless I clearly saw that some principle of law had been mistaken; or unless I was bound by authorities to pronounce that verdict wrong. With respect to authorities there are none, for this is admitted to be a new case: we ought therefore to be fully satisfied, that upon some principle of law the verdict is wrong before we interfere by granting a new trial. It has been argued in support of the rule, that the voyage insured was the third branch of a specific voyage, specifically described in the policy: but I take the voyage insured to be a voyage from Saffi to Lisbon only. Now that the voyage so described did literally commence there can be no doubt, and I know no way in which that voyage could be restricted in point of commencement or connexion with any other voyage, but by representation or warranty. That point was ably put by my brother *Shepherd*; If a man be asked to underwrite a voyage from Saffi to Lisbon, he naturally says, "Let me know what this voyage is, and at what time it is to commence, that I may judge of the risk. Is the ship now at Saffi, or where is she?" He will expect a *representation and that representation ought to be true: here [*204
the representation was, that the ship was bound from Lisbon to Madeira with a cargo, from Madeira to Saffi in ballast, and from thence to Lisbon. That representation was really true at the time that it was made, and the underwriter was to form his own calculation of the time when the *Timandra* would arrive at Saffi.

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If the insurance was made on a representation which was true at the time, it will be difficult to state a case where subsequent events, not happening through misconduct, and not totally disappointing the voyage, will discharge the underwriter. He formed his judgment of the case, knowing that all was executory, and that an alteration might arise of a kind that might increase his risk; upon the representation made to him he underwrote. The fact is, that the representation being true, a circumstance occurred under which the captain was distressed how to act, and respecting which there might have been different opinions: he resolved to go back to Lisbon; the charterer there called upon him to fulfil his engagements; he sailed accordingly, and arrived at Saffi; and in the course of his voyage home was captured. Then why have the jury done wrong in saying that the underwriters are liable? They were literally bound to insure a voyage from Saffi to Lisbon; tied up, indeed, as far as a representation of the projected voyage, executory in its nature, could tie it up, and that representation was true at the time that it was made. The voyage from Saffi to Lisbon might have been performed with as much ease after the circuitous voyage had taken place (unless a Spanish war had broken out) as in the direct course originally proposed. On what principle then can the underwriters be discharged? The voyage has in substance been performed: the ship was diverted from her intended course by circumstances for which no one was to blame, and having arrived at Saffi, took in the cargo which was the original object of the insurance.

HEATH, J.:

I am of the same opinion. This is an insurance on a voyage from Saffi to Lisbon, which being a voyage to commence *in futuro*, it was necessary that the agent of the insurer should give all the intelligence of which he was possessed to the underwriters. Now the captain's orders were to go from Madeira to Saffi, and from thence to Lisbon. Indeed it is not contended that there was any misrepresentation, but only that the voyage insured was never commenced; though the intention clearly was to have proceeded in the round voyage, had not the crew been

*alarmed by reports of an enemy off the coast of Saffi. The question is not whether the captain meant to abandon, since he had it not in his power so to do, without the consent of the charterers; and at their instance he did proceed on the voyage as soon as he conveniently could. This is like all other cases of deviation justified by particular circumstances, and I see no reason to quarrel with the verdict.

DRISCOL v. PASSMORE. [*205]

ROOKE, J. expressing some doubts with respect to the liability of the underwriters, founded on the circumstance of their having at the time of the insurance apparently taken into consideration the period at which their risk was to commence, since they refused to underwrite the *Timandra* till the broker informed them of her arrival at Madeira ;

The case stood over till this day, when EYRE, Ch. J. said, that the COURT were now unanimously of opinion, that no new trial ought to be granted.

Postea to the plaintiff.

C. P. EASTER TERM.

NORTON *v.* FAZAN.

1798.

May 5.

(1 Bos. & P. 226—227.)

[226]

Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery; held, that the husband should be liable for necessaries furnished to her unless it appeared that the plaintiff knew or ought to have known the circumstances under which she was living.

ASSUMPSIT for necessaries sold to the defendant's wife and children.

Some time previous to the delivery of the goods, the defendant having discovered that his wife kept up an adulterous intercourse with another man, separated himself from her, leaving

NORTON v. FAZAN.

her in possession of the house which he had inhabited, together with two children bearing his name. In this house she was living in a state of adultery, at the period when the goods in question were delivered. The defendant had made no regular provision for his wife. The cause was tried before Eyre, Ch. J. at the sittings at Westminster in Easter Term, who was of opinion that if the plaintiff knew or ought to have known that the separation proceeded from the adultery of the wife, the jury should find for the defendant; if not, that the plaintiff was entitled to recover. Verdict for the plaintiff 2*l.* 10*s.*

Clayton, Serjt. now moved for a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered. He contended, that whether the plaintiff had notice of the adulterous intercourse or not was immaterial, and cited *Morris* v. *Martin*, 1 Str. 647; *Manwaring* v. *Sands*, 1 Str. 706, and *Govier* v. *Hancock*, 6 Term Rep. 603,* and that as the separation was notorious, and the adultery committed during the separation, the defendant was discharged.

[227] EYRE, Ch. J.:

If the defendant in another action brought against him by some other tradesman shall be able to establish the notoriety of his wife's situation, he may defend himself. But as the case stands at present this woman appears to have been living in a house in which she was placed by the defendant himself, together with two children bearing the husband's name, both of whom were born in wedlock. It is true that she had an adulterous intercourse with another man, but that was not proved to be known to this tradesman. If the defendant can bring it home to any other tradesman, who shall be in the same situation as the present plaintiff, that he did know or ought to have known the circumstances under which the wife was living, the defendant may perhaps be able to prevent another verdict passing against him.

BULLER, J.:

Every case on the facts is peculiar to itself, and this is so different

* 3 R. R. 271.

from every other case which has been decided in Westminster Hall that I consider it as anomalous. The verdict is clearly and strictly right. The wife committed adultery for a considerable time while she was living with her husband; he voluntarily yielded his bed to the adulterer, and made no provision for her. Then what colour of defence is left? Knowing of her criminal conduct and having made no provision for her, he must maintain her as before.

NORTON v. FAZAN.

HEATH, J.: I am of the same opinion.

ROOKE, J.: I am of the same opinion.

Clayton took nothing by his motion.

GRINDLEY AND ANOTHER *v.* BARKER AND OTHERS.

(1 Bos. & P. 229—242.)

1798. *May* 10.

[229]

If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. A condemnation by four out of the six triers of leather appointed under 1 Jac. I. c. 22 (the whole number being met for the purpose of trying), must be considered as the condemnation of all six.

TRESPASS for seizing, detaining and converting certain hides of leather, the property of the plaintiffs.

Plea, justifying the seizure and detainer [on the ground that the hides had been condemned (as not being well dried) by the searchers appointed under the Act, 1 Jac. I. c. 22.]

[230]

Replication tendering issue on the fact of the hides not being well dried. New assignment, that after the seizure of the said hides of leather and within six days after notice thereof had been given to the said Mayor of the said city to wit on &c. the said Mayor according to the form of the said Act did in due manner elect and appoint six honest and expert men to wit Joseph Lacey, George Murray, Edmund Sylvester, Samuel Norris, Samuel Brooks and William Webster, the said J. L. and G. M. then and there being of the better sort of the company of cordwainers, the said E.S. and S. N. then and there being of the better sort of the

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curriers of London, and the said S. B. and W. W. then and there being of the better sort of tanners using Leadenhall market, and no one of them being of kin or affinity to the said plaintiffs as triers for the trying, amongst others, of the said hides so seized as aforesaid; which said six persons according to the said Act of Parliament upon their corporal oaths taken before the said Mayor did on the second market day holden upon the Tuesday for leather next after the said seizure in the afternoon of the same day being the ——day &c. to wit at &c. inquire straightly examine and try whether the said hides were sufficiently serviceable or not according to the intent and true meaning of the said Act: And the said plaintiffs say that upon such inquiry examination and trial the said S. B. and W. W. differed from the said four other persons so appointed triers as aforesaid with respect to the verdict which ought to be given concerning the said hides and the said S. B. and W. W. then and there refused to find the same insufficient or unserviceable, and the said hides were found and returned insufficiently dried and accordingly condemned by the said J. L., E. S., G. M., and S. N. only without the concurrence of and in opposition to the said S. B. and W. W. and no other trial finding or adjudication hath been had or given in relation to the said hides. Of all which premises the said defendants afterwards and before the commencement of this action to wit on &c. at &c. had notice. And the said plaintiffs further say that they brought this action not only for the trespasses in the introductory part of the plea mentioned and

[*231] thereby attempted to be justified *but also for that the said defendants after the said S. B. and W. W. had refused to find the said hides of tanned leather to be insufficient or unserviceable, and also after the said defendants had such notice as aforesaid, to wit, at &c. kept and detained the said hides for a long space of time, to wit &c. and converted and disposed of the said hides to their own use in manner and form as the said plaintiffs have above thereof complained against them. Which said trespasses above newly assigned are other and different &c. wherefore &c.

Pleas to the new assignment; 1st, Not guilty; 2ndly, That the defendants being such searchers as aforesaid, and having so

as aforesaid seized the said hides, so as aforesaid offered to sale by the said plaintiffs in the market of Leadenhall in the city of London by virtue of the said statute afterwards and after the same had been so as the said plaintiffs have above alleged found by the said triers appointed as aforesaid and the said plaintiffs had by reason thereof forfeited and lost the same, the defendants kept and detained the same in order that the said hides so forfeited, being leather seized within the city of London, by virtue of the said statute might be brought to Guildhall in London there to be prized by indifferent persons in manner and form as is by the said statute directed; as it was lawful for them to do, to wit, at &c. which are the same supposed trespasses &c. and this &c. wherefore &c.

General demurrer and joinder.

This demurrer was twice argued; first in Hilary Term last by *Shepherd*, Serj. for the plaintiffs, and *Le Blanc*, Serj. for the defendants, and now in this term by *Cockell*, Serj. for the former, and *Adair*, Serj., for the latter. * * *

EYRE, Ch. J.: [236]

The true question in this case lies in a very narrow compass; it is this: What is the operation in law of a judgment of four out of six triers, six being the number constituted to be the triers, and the six being assembled to inquire and try; whether it is to be deemed the finding and judgment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred then this leather is not found insufficient, but if the operation of law on the finding of four who are the majority of the body duly assembled, be, that their judgment is the judgment of the whole, and therefore the judgment of the triers; then the leather must be taken to have been found insufficient, and the defendants are justified. On the first argument I thought this question would turn on two general heads of inquiry. 1st, What the general rule of law was in the case of bodies of men entrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? 2ndly, Supposing the latter to be the general rule, whether that

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general rule is to be controlled by the intent of the Legislature as collected from the scope and provisions of this Act?

With respect to the first question, I think it is now pretty well established, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further: there it is not necessary that the whole number should meet; it is enough if notice be given; and a majority, or a lesser number, according as the charter may be, may meet, and when they have met, they become just as competent to decide as if the whole had met. With a view to this case, those who have met resemble the six triers who have authority to decide: and then a question arises, how they may act when they have met. The case in Atkyns † shews the opinion of a great judge, Lord HARDWICKE, who was much conversant with this subject in one part
[*237] of his judicial *life, that the majority of persons assembled will conclude the minority, and an act done by them will be the act of the whole body. And that part of the Law of Corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body. If that be so, the argument drawn from the word "triers" being used generally, in the 33rd and 46th sections, will not stand much in our way: because the judgment of four triers in this case is the judgment of all, as much as if all had concurred. There is nothing then in the general rule of law to prevent this finding from being held good. But the question is still open, whether on the construction of this particular statute, it does not appear that not only all the persons must be assembled, but that every one of them should concur, or at least that one of each class should concur. There was something very plausible in that last argument, but I am now clearly satisfied, either that all must concur, or that a majority may decide for the whole. There is nothing in the Act which necessarily leads to a construction, that the

† *Attorney-Gen.* v. *Davy*, 2 Atk. 212.

majority must be composed in any particular manner. With regard to the general question, it has been argued most weightily, that as the leather might be seized in all the stages of the manufacture, it was right that the authority which was to determine should be delegated to persons of all the different trades, in order that the body might be aided and assisted by the united experience of all the branches, whenever the inquiry should come before them. But it struck me that when the body was so constituted and had assembled, and could have the assistance of the united experience of all, the necessity of all concurring in the final judgment was not so apparent, and might be attended with inconvenience. It is indeed a truth, that in a body composed of three classes of trade, those who are of the particular trade of which the owner of the goods happens to be, may feel an inclination to favour the members of their own trade, and may hesitate to condemn, when they themselves might be liable to condemnation the next time. And this might be attended with a great deal of inconvenience, since the searchers are obliged to execute a public duty, and the validity of their acts must depend upon the judgment of the triers.† It seems better that when all the knowledge which each class can afford has been communicated, the *whole should be governed by the [*238 majority. This case has been compared to the case of juries, and in many respects it is analogous; but in an abundance of particulars it is unlike. On the abstract question it has often been debated, whether there is policy and good reason on the side of the rule which requires unanimity in a jury. However good therefore the rule may be found in practice when applied to juries, yet if it be doubtful in theory we ought not to force the analogy, and apply the rule to other cases where it may be found inconvenient. It is impossible that bodies of men should always be brought to think alike: there is often a degree of coercion, and the majority is governed by the minority, and *vice versâ*, according to the strength of opinions, tempers, prejudices, and even interests. We shall not therefore think ourselves bound in this case by the rule which holds in that. I lay no great stress on the clause of the Act which

† *Warne* v. *Varley*, 6 Term Rep. 443.

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appoints a majority to act in certain cases, because that appears to have been done for particular reasons which do not apply to the ultimate trial: it relates only to the assembling the searchers; now there is no doubt that all the six triers must assemble; and the only question is, what they must do when assembled? We have no light to direct us in this part, except the argument from the nature of the subject. The leather being subject to seizure in every stage of the manufacture, the tribunal ought to be composed of persons skilful in every branch of the manufacture. And I cannot say there is no weight in the argument, drawn from the necessity of persons concurring in the judgment, who are possessed of different branches of knowledge, but standing alone it is not so conclusive as to oblige us to break through a general rule; besides, it is very much obviated by this consideration, that when all have assembled and communicated to each other the necessary information, it is fitter the majority should decide than that all should be pressed to a concurrence. If this be so, then the reasons drawn from the Act, and which have been supposed to demand, that the whole body should unite in the judgment, have no sufficient avail, and consequently the general rule of law will take place; viz. that the judgment of four out of six being the whole body to whom the authority is delegated regularly assembled and acting, is the judgment of all.

BULLER, J.:

The first question to be considered in this case is, what is the legal effect and understanding of the facts disclosed upon this record, and I think this point has been extremely well *argued by my brother *Adair*, whose argument, together with the authorities which he has cited,† has convinced my mind, that sitting here, we must pronounce this to be the finding of all the six triers.

[*239]

This is a case in which six persons are united together as one body, and are required by the Act to form an opinion. They are not permitted to say we will form no opinion, but they must decide whether the leather be sufficient and serviceable or not. Four of them expressly decide that it is not: the other two do

† *R.* v. *Foxcroft*, Burr. 1017; *R.* v. *Withers*, cited by WILMOT, J., Burr. 1020; *Attorney-Gen.* v. *Davy*, 2 Atk. 212; *R.* v. *Beeston*, 3 T. R. 592, 1 R. R. 777; *Withell* v. *Gartham*, 6 T. R. 388, 3 R. R. 218.

not agree in that finding, but they do not dissent: and I take it that in such a case, where the law compels persons convened under an oath to form an opinion, if any of them do not pronounce against the opinion of the majority, they find for it. If that be so, it puts an end to this case; for if it is to be understood, upon this record, that this judgment has the effect of a judgment of the six triers, no questions remains to be considered.

But upon the Act two questions arise: 1st, Whether all the six triers must concur in their judgment, or whether a majority are sufficient to decide? 2ndly, If a majority can decide, what that majority must consist of? Now it seems to me, that upon the first question the authority of Co. Litt. 181 b, if we went no further, is decisive; because it is there said in express terms, that in matters of public concern the voice of the majority shall govern. It is to be remembered, that not a single case, not a dictum has been quoted on the other side of the question, and that this stands wholly uncontradicted. In the next place, I think there is great weight in some of the cases which have been mentioned, and that the conclusion to be deduced from them goes much further than has been admitted. *Withell* v. *Gartham* † was said to have been decided upon three different grounds: 1st, Upon the founders intent; 2ndly, On a resemblance to the case of corporations; and 3rdly, Upon usage. One thing is clear from this authority, that a deed which speaks in general terms, giving a power to a certain number of persons, does not necessarily import that all these persons shall concur, because if that were necessarily the legal construction of the deed, usage would be laid out of the question. Then we have got thus far upon this case, that a deed which gives a power to a certain number of persons may admit of two constructions; either that all must join in the act, or that the majority may do it; in no other way could usage be admitted; usage being admitted, it certainly had its effect in that case. The case therefore is open to the argument of inconvenience, which was slightly touched upon: *for if the Act admits of two constructions, certainly the argument of inconvenience applies. Now if it be necessary that all should concur, one man may destroy the determination of [*240]

† 6 T. R. 388, 3 R. R. 218.

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five, though that one may be the least qualified of the whole six to judge; and the consequence will be, that if the defect be in the tanning of the leather, and by the tanners and the cordwainers opinions it be pronounced insufficient, yet if one currier declare it to be sufficient, the judgment of the others will not avail. Why, that is unreasonable upon the face of it, and therefore such a construction cannot be adopted. It seems to me therefore upon the whole view of the case, that the majority of the six must decide. With respect to that majority being composed in any particular way, I can see nothing in the statute which warrants such an idea.

HEATH, J.:

I am of the same opinion, and as the case has been so fully entered into, I shall very shortly deliver the reasons on which my opinion is founded. In the first place, a question has been made whether or no a power requiring in the exercise of it skill and discretion, being delegated to a certain number of men, ought to be exercised by all, or whether it is sufficient that it should be exercised by the majority of them? I do not think that either of the three cases cited at the bar, either the case out of Atkyns,* or the two cases out of the Term Reports,† directly go to prove the proposition contended for by the plaintiffs; because those decisions might have been maintained upon other grounds, for I observe that in all the three cases the powers in question were new powers delegated to bodies of men, in which by several statutes and the common law the acts of the majority conclude the minority; it might therefore be considered that the new power ought to be exercised exactly in the same way as the old power would be. However, we find some dicta of very great respectability, viz. of Lord HARDWICKE, and the Judges who presided in the King's Bench, to shew that as well upon common law and common reason as upon the particular circumstances of the cases before them, the act of the majority concluded the minority. Then the question has been argued upon the different clauses of the statute, and it seems to me,

* *Att.-Gen.* v. *Davy*, 2 Atk. 212.
† *R.* v. *Beeston*, 3 T. R. 592, 1 R. R. 777; and *Withell* v. *Gartham*, 6 T. R. 388, 3 R. R. 218.

that a very good answer has been given to these clauses. All must concur in trying, and then though they be of different opinions, some of one opinion, some of another, yet all having tried, the majority shall bind. GRINDLEY v. BARKER.

Though we have no particular decisions directly in point, yet there are some usages and some received opinions which are equivalent to decisions.—We know very well that in all commissions of oyer and terminer and gaol delivery, and of the peace, where a quorum is constituted, and it is necessary that a quorum should be present to do the acts for which they are appointed, yet if the quorum are in the minority, the majority shall conclude the minority. For these reasons I concur in opinion with his Lordship and my brother. [241]

ROOKE, J. [concurred.]

Judgment for the defendants.

DA COSTA *v.* DAVIS.

(1 Bos. & P. 242—243.)

1798. *May* 11.

If the condition of a bond be to render a person in execution who has once been discharged, it is void. Condition to do one of two things; one becomes impossible; no reason for not performing the other.* [242]

DEBT on bond for 1,460*l.* dated 20th July, 1797, and given by the defendant and one J. G. Kohn to the plaintiff to procure the release of one Edward May, who was in execution at the suit of the plaintiff. The condition was that if the obligors or the said Edward May should pay to the plaintiff 730*l.* and interest, on or before 10th January, 1798; or if default should be made in such payment, then if the obligors should, on the 12th January, 1798, surrender the said Edward May to the plaintiff, at the house of one Thomas Wright, between the hours of twelve and two, so that he might be again taken in execution, the bond should be void.

Plea. That before and at the time of making the bond, May was a prisoner in the Fleet, charged in execution at the suit of

* As to the general question of impossibility, see *Jacobs* v. *Crédit Lyonnais* (C. A. 1884) 12 Q. B. D. 589, 53 L. J. Q. B. 156; *Mackay* v. *Dick* (1881) 6 App. Ca. 251.—R. C.

DA COSTA v. DAVIS.

the plaintiff and several others: that a little before the making of the bond, May requested the plaintiff to discharge him from the said execution at his suit, and offered the bond in question as a security for his debt to the plaintiff; which bond was accordingly given, and May was discharged from the execution at the plaintiff's suit; but that the other creditors having refused to discharge him, he continued a prisoner, whereby the obligors were prevented from surrendering him at the time and place in the condition mentioned; that the obligors, before the day, gave notice to the plaintiff that they could not surrender May according to the condition, but that May was then in the Fleet, and would be there on the 12th January, between twelve and two, and that the obligors would then and there render the said May, so that he might be again taken in execution; and that the obligors on the 12th January were in the Fleet, and attended there between twelve and two, and then and there had the body of the said May, and were ready to surrender and deliver him up to the plaintiff, so that he might be again charged in
[*243] execution, but that *neither the plaintiff or any person on his behalf was there to receive him. And this, &c. wherefore, &c.

General demurrer and joinder.

Le Blanc, Serjt. for the plaintiff contended, that no excuse for non-performance of the condition was shewn by the plea.

Williams, Serjt. *contrà*, insisted, that the condition to surrender had been substantially performed, and cited *Freshwater* v. *Eaton*, 1 Str. 49, where the condition of the recognizance was to surrender the principal to the keeper of the Palace Court; a writ of error in the King's Bench having been brought, and the judgment below affirmed, a surrender to the Marshal of the Marshalsea was held a good performance of the condition of the recognizance.

The COURT was of opinion on the authority of *Vigers* v. *Aldrich*, 4 Burr. 2482, that the first part of the condition was void, being to render a prisoner in execution who had been once discharged, and therefore as the other part had not been per-

formed, the bond was forfeited. Besides that where the condition of a bond is to do one of two things, shewing that one could not* be performed, is no good reason for not having performed the other.

DA COSTA v. DAVIS.

Judgment for the plaintiff.

C. P. TRINITY TERM.

PARKIN *v.* RADCLIFFE.

1798. *June* 15.

(1 Bos. & P. 282—286.)

[282]

It seems that a custom for the homage to assess a compensation in lieu of a heriot, is unreasonable and void.

Evidence that the homage have been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation.

REPLEVIN of a cow.

[The question, which was raised on the pleadings of this case sufficiently appears from the judgments.]

EYRE, Ch. J.: [285]

My difficulty is, how to incorporate the two customs. The landlord pleads a custom to have the best live or dead chattel as a heriot; the tenant answers that he is not entitled to the best live or dead chattel, but to a sum of money by way of compensation. This is pleaded two ways, first, as a sum of money to be assessed absolutely by the homage; secondly, as a sum to be agreed upon by the landlord and tenant, and on failure of an agreement then to be assessed by the homage. Either of these pleas is an absolute denial of the custom that the lord should have the best live or dead chattel. This compensation is pleaded to be in lieu of a heriot; but since it is stated not to depend upon the will either of lord or tenant, but to take place in all cases, it cannot be in lieu; it ought therefore to have been stated in the name of a heriot, and as an inducement to a

* Unless it become impossible by the act of the obligee, Com. Dig. Condition (K. 2), or by the act of God. *Laughter's* case, 5 Co. 21 B.

PARKIN v. RADCLIFFE.

traverse. If the plaintiff had said, true, there is such a custom, but if the tenant prefer to pay a sum of money in lieu, then he shall pay such a sum as the parties shall agree upon, that would have been a modification of the custom, and the money would have come in lieu of the original right of the landlord, but here the original right is stated in two contradictory ways.†

BULLER, J.:

I am not quite clear that the customs stated on these pleas may not stand together, as well as those in *Kenchin* v. *Knight*.‡ No answer however has been given to the argument advanced against the goodness of the custom set up by the pleas in bar, viz. that there is no rule to direct the jury in assessing the amount of the compensation. I think the custom bad.

HEATH, J.:

All the members of the homage are liable to pay this compensation, and are therefore interested in the assessment. Suppose a custom that the parishioners of a certain parish should assess a compensation to be paid to the rector in lieu of tithes; it would be void as unreasonable and uncertain. In the case in Leonard§ the landlord could never be injured by the assessment, and he might be put in a better situation.

ROOKE, J.:

I have not the same difficulty with respect to the custom. A heriot is not due of common right as tithes are, but is the mere creature of custom. The lord has no right but by custom, [*286] *which is the life of copyhold. This is a claim of the first impression, for the lord does not claim from the out-going tenant, but from the in-coming tenant, who is to have his best beast taken from him: and yet I conceive that it may be good and reasonable that the in-coming tenant should pay such a sum of money by way of acknowledgment to the landlord, as

† Vide *Bland* v. *Moseley*, cit. 9 Rep. 58; *Spooner* v. *Day and Another*, Cro. Car. 432; and *Murgatroid* v. *Law*, Carth. 117.

‡ 1 Bl. 49; 1 Wils. 253, B. R.

§ *Bills case*, 4 Leon. 238.

the homage shall assess. However I incline to think that the plea in bar is not well pleaded.

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The COURT then offered a second argument, which being declined by the parties who meant to go to trial on the issues joined, the Court said that as they were all of opinion, though on different grounds, that the demurrer must prevail, they should give

Judgment for the defendant.

EASTER TERM. 1799. *April* 12

[393]

The parties having gone to trial upon the issues joined according to the intention intimated by them when the case was before the Court on the former occasion, the cause came on before Thompson, Baron, at the Spring Assizes for York, when a verdict was found for the plaintiff.

Cockell, Serjt. now moved for a new trial on two grounds, 1st, A misdirection of the Judge; 2ndly, His having rejected evidence which ought to have been admitted. He stated the circumstances at the trial to have been as follow: The defendant having given parol evidence to shew that heriots had always been taken on alienation, and that several seizures had been made, produced certain entries from the year 1667 to the year 1794; these for the most part were entries of sums assessed by the jury of the manor for heriots or fines of heriots (both terms being used in the Rolls) on alienation; one however dated the 31st May, 1667, was in the following form: "Thomas Haigh one old cow for a fine of a harriott for William Jackman of Halifax upon alienation 1*l.*" It was not disputed that heriots were due on descent: in order therefore to make these entries support a right to a heriot on alienation, and to explain the term "fine of heriot" therein used, the defendant offered to prove, that by the custom of the manor, appraisers had always been appointed upon the death of every tenant to appraise his effects; that the jury had then inquired which was the best chattel of the deceased, and declared it to be a heriot due to the lord; after which they had proceeded to set a price upon it, in doing which they had always followed the valuation of the appraisers: and he

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produced the rolls of the manor relating to descent, in which was the following entry, dated 15th April, 1661, among others of a similar nature: "John Marsden's death presented, and that a cow was the best of his goods at his death, and of the value 11*l.* *que prædict' vacca deliberari debet Dño maner' pro heriot suo.*" This last evidence was rejected by the learned Judge, who treated all the entries as evidence of mere money payments, and said that the only question to be tried by the jury was, whether a heriot in kind were due? For that the *lord having claimed a specific thing, if not entitled to that must fail in his avowry.†

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EYRE, Ch. J.:

Had I been in the place of the learned Judge, I am not quite certain that I should have rejected the evidence; but had I received it I should have found myself obliged to turn the application of it against the defendant. The entries in question tend to shew, that no heriot in kind is due even in the case of descent, but a pecuniary payment only. Whether the jury in estimating the sum to be paid refer to the value of the best chattel, or whether they assess a sum in gross, it is equally clear that the lord receives nothing in specie. The right of the tenant to have a sum assessed in lieu of the chattel is inseparable‡ from the right of the lord: the right of the latter therefore is not an absolute right to the chattel, but to something to be commuted for it by the jury.

Cockell took nothing by his motion.

† On a justification by the lord of the manor, under a custom, that the lord should have the best beast on the tenant's death the custom proved was, that the lord should have the best beast or good, &c. and the whole Court of C. B. held the variance fatal. *Adderley* v. *Hart*, T. 4 Geo. I.

‡ *Vid. Gray's* case, 5 Co. 78 b, in which it was held, that where a party prescribes absolutely, and the evidence is of a prescription under a condition or limitation, if such condition or limitation be parcel of the prescription, it is a variance: *secùs* if not parcel.

QUICK & UX. *v.* SIR W. STAINES, KNT., SHERIFF.

(1 Bos. & P. 293—296.)

1798. *June* 18.

[293]

If an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.

THIS was an action of trover for household goods brought by the husband and wife in right of the wife as executrix of her former husband M'Pherson, under the following circumstances: M'Pherson died about nine months previous to the action being brought, having made his widow his executrix, who continued in possession of his goods, and about three months after his death married the plaintiff Quick. During those three months she used the goods as her own, and after her marriage with Quick the goods were treated by them both as his. The defendant having taken these goods in execution at the suit of a person who was a creditor both of M'Pherson and of Quick, but who claimed them upon the present occasion to satisfy the debt of the latter, received notice from the plaintiffs that the effects which he had taken were the unadministered goods of M'Pherson.

EYRE, Ch. J. before whom the cause was tried at the Westminster sittings after Easter Term, being of opinion that a *devastavit* had been committed on the part of the executrix, by putting the effects of M'Pherson into the hands of her second husband, directed a nonsuit against the plaintiffs, with liberty to move to set it aside and enter a verdict in their favour. Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Shepherd, Serjt. now shewed cause:

It cannot be denied that the executrix has such a property in the goods of her testator as to enable her to sell and make a good title, though she may render herself liable for a *devastavit*. Now the executrix in this case having first treated the goods as her own, and the plaintiff Quick having since her marriage with him treated them as his, is sufficient to shew that she had given

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them up to him, which must have the same effect as if she had sold them. If by her conduct she did not make these goods her own, what period of time can be stated at which the effects of a testator in the hands of an executor are to be considered as converted to the use of the executor? In *Farr* v. *Newman*, 4 T. R. 621, [2 R. R. 479,] the Court seemed to consider that if any thing had been done by the executor to raise such a presumption the goods might be considered as his own: and Lord KENYON was of opinion, that till the contrary be shewn the goods must be considered as the property of him in whose hands they are found. Here perhaps it may be contended, that a claim is made by the [*294] *executrix, but it must be remembered that she claims against her own acts.

Le Blanc and *Clayton* Serjts. in support of the rule:

An executor does not take an absolute property in the goods of his testator, but such an one only as will enable him to fulfil the duties of his office. In this case M'Pherson died, leaving his widow in possession of his goods in that house in which they had lived: she never removed them, but they continued in the same house until and after her intermarriage with another person. At what period then did she take possession of the goods as her own? An executor may convey to another the goods of his testator for money, and inasmuch as third persons cannot know in what manner that money is applied, creditors cannot follow the goods. But an executor cannot devise the goods of his testator, nor are they forfeited by his attainder, nor are they liable to the bankrupt laws. *Howard* v. *Jemmet*, 3 Burr. 1369. If an executor pay the debts of his testator to the amount of the value of the goods, he continues in possession of them as becoming the purchaser. The old form of the action of trespass by an executor against a person who takes the goods of the testator, shews the law; for the gravamen is "the delaying of the execution of the will," F. N. B. 87, E. In *Ridler* v. *Punter*, Cro. Eliz. 291, a term in the hands of the husband in right of his wife as administratrix, was held not to be extendible for his debt, though it had continued in his hands and had never been granted; and in *Farr* v. *Newman*, though the alter-

ation of property was as great as in this case, yet it was held that the goods were not liable for the husband's debt. Indeed it would be hard if the act of marriage alone were to make the executrix liable to a *devastavit*. It was said by the Court in *Farr* v. *Newman*, that if the sheriff had any doubt to whom the goods belonged, he should have summoned a jury *de proprietate probandâ*; and though it has been contented that the present case differs from that, since that was an action between two creditors, whereas this is an attempt by the executrix to disaffirm her own acts, yet that argument is answered by the opinion of Lord KENYON, 4 T. R. 647, viz. that it is too late to say that the possession of goods is in all cases conclusive evidence of property.

EYRE, Ch. J.:

I was not aware at *Nisi Prius* that the case of *Farr* v. *Newman* had been decided in so solemn a manner, though if I had, it would have made no other difference than to make me wish that this case should be put upon the record. The first objection *to the authority of that case, as applying to this, [*295] arises from the form of the action, which was not the same as here; and the second, from the difference of the parties. It is one thing whether a creditor shall insist that an executor has been guilty of a *devastavit*, and another, whether the executor shall take advantage of his own wrong, and justify his own misconduct by saying that the goods are not his but his testator's. The case of *Whale* v. *Booth* and others, cited 4 T. R. 625, is directly in the teeth of *Farr* v. *Newman*. I think, however, that this question may be decided on a principle which will leave the latter case altogether untouched, viz. that the executrix had taken the goods to her own use. On that ground I shall have no difficulty in deciding: but we will look further into this question.

Cur. adv. vult.

On the next day the opinion of the Court was delivered by

EYRE, Ch. J.:

We have looked into the case of *Farr* v. *Newman* and the

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authorities there cited, and the Court adheres to the opinion, that this nonsuit ought not to be set aside. We proceed on a ground which does not at all interfere with the case of *Farr* v. *Newman*; as to which I shall say nothing either one way or the other. The ground of our decision is that originally taken, viz. that a *devastavit* has been committed by the executrix, who before her marriage had converted the goods. I allow that it would be hard (as it was argued) if the mere act of marriage had worked a *devastavit*; and we do not hold that. But when in consequence of the marriage the effects were permitted to come into the hands of the husband and to be used by him, then at least, if not before, a clear *devastavit* was committed, since that conduct amounted to a conversion of the goods. We think that where the executrix herself or her husband have converted the goods, it does not lie in the mouth of either of them to say that they are not the property of the husband, in a case between the executrix and one of his creditors. We do not say any thing with respect to the question, as between creditors of the original testator pursuing the assets with legal diligence, or the executrix in respect of those assets, and creditors of the executrix or the husband of the executrix, whether they shall or shall not have a preference against a creditor of the executrix. That question will be fit to be considered when it arises, and then we shall decide it, with a proper respect for the case of *Farr* v. *Newman* contrasted with the case of *Whale* v. *Booth*, 4 Term Rep. 625 n.† before Lord MANSFIELD *with the other cases to be found in the books upon the subject, and with the general principles of law relating to the goods of testators and intestates, and the nature of a claim made on their representatives in respect of those goods. It may be a difficult question, but it is not now to be touched.

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Per CURIAM:

Rule discharged.

† 2 R. R. 483.

TINGREY, WIDOW, *v.* BROWN.

(1 Bos. & P. 310—311.)

1798.
June 21.

[310]

The administratrix of an executor cannot sue for the double value of lands held over after notice to quit under a demise from the testator, contrary to 4 G. II. c. 28, without taking out administration *de bonis non*; even though the tenant has attorned to her.

DEBT for double the yearly value of lands held over contrary to 4 G. II. c. 28. The first count of the declaration stated a demise by one Judith Tingrey (who was possessed for a long term of years) to the defendant, of the premises in question, for twenty-one years; that she died, having by her will made Francis Tingrey her sole executor, who proved the will, and took execution upon *himself, "by reason whereof he the said Francis [*311] then and there became entitled to the said demised premises, subject to the said lease;" that he died intestate, and that the plaintiff took out administration of his effects, "by virtue whereof she became, and was, and is entitled to the said remainder of the said demised premises for the said term, which is yet unexpired, and so demised to the defendant as is aforesaid; of all which premises the defendant afterwards (to wit) on, &c. at &c. had notice, and then and there attorned to and became the tenant to the plaintiff for the residue of the said term." It then stated that after the expiration of the defendant's term, and notice in writing to quit, he continued to keep possession, whereby, &c.

To this count there was a general demurrer and joinder.

Williams, Serjt. was to have argued in support of the demurrer, but *Le Blanc*, Serjt. being called upon by the Court to begin on the part of the plaintiff, contended that as this was not a debt due to the testator, it was not necessary for the plaintiff to clothe herself with the character of administatrix *de bonis non*. That it did not appear but that all the debts had been satisfied by Francis Tingrey, in which case this lease would have passed to his personal representative the plaintiff. He observed also that the defendant admitted by the demurrer that he had attorned to the plaintiff, and therefore as this statute says that

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the landlord shall bring the action, that landlord must be the person to whom the tenant has attorned.

EYRE, Ch. J.:

Is not every thing unadministered which has not been reduced into the actual possession of the executor, and converted by him? Most certainly in any case in which the plaintiff means to make title, she must take out administration *de bonis non*. It is not incumbent on those who resist, to shew that there are debts of the testator unsatisfied, but the plaintiff must shew that there are no debts, and that the executor possessed himself absolutely in his own right.

Per CURIAM:

Judgment for the defendant.

C. P. MICHAELMAS TERM.

HILL AND ANOTHER *v.* SECRETAN.

1798. *Nov.* 9.

(1 Bos. & P. 315—316.)

[315]

A. being indebted to B. without any order from him consigns goods to C. to be held for B. and indorses the bill of lading to C.; resolved that B. had an insurable interest in the goods so consigned.

ACTION on a policy of insurance on goods on board the *San Bernardo* from St. Andero to London. The declaration averred that the plaintiffs were interested to the amount insured.

At the trial before EYRE, Ch. J. at the Guildhall sittings after Trinity Term, it was proved that the house of De la Torrè in Spain consigned 29 bags of wool to the house of Dubois & Son in London, and indorsed the bill of lading to them; but that with the bill of lading came a letter annexed, directing Dubois & Son to hold 15 bags for a house at Halifax and the remainder for the plaintiffs at Exeter, which was the subject of the present insurance. It appeared also that De la Torrè was indebted to the plaintiffs in the sum of 500*l*., but they had given

no orders for these goods. The ship was captured by the French, but afterwards retaken. The jury found a verdict for the plaintiffs.

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Shepherd, Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a new trial be had, insisting that the plaintiffs had no insurable interest in the goods as the bill of lading was not indorsed to them, and as De la Torrè would still be liable for his debt to the plaintiffs, if the goods should not reach them.

But the COURT were clearly of opinion that as the goods were consigned to Dubois & Son to hold for the plaintiffs, the former *were to be considered as trustees for the latter from the time the goods were put on board the ship; that the circumstance of the plaintiffs being creditors of De la Torrè raised a good consideration for the consignment, and therefore no doubt could be entertained of the plaintiffs having an insurable interest.† [*316]

Shepherd took nothing by his motion.

† Lord KENYON, in the case of *Anderson* v. *Edie*, Guildhall sittings, Trinity term, 35 Geo. III. Park Insur. 432 a, was of opinion that a creditor has an insurable interest in the life of his debtor, since the means by which he is to be satisfied may materially depend upon it, and at all events the death must in some degree lessen the security.

1798.
Nov. 14.

[316]

WOLFF AND OTHERS *v.* HORNCASTLE.

(1 Bos. & P. 316—325.)

A. having consigned a cargo to B. and drawn bills on him to the amount of it, in favour of C. his general agent, sends these bills together with the bills of lading to C., desiring him to transmit them to B. "that B. may have an opportunity of insuring." He also draws a bill for 300*l.* on C., which is accepted; B. refuses to take to the cargo or accept the bills drawn on him: C. then effects a policy in his own name, and informs A. thereof, who approves of his conduct. In an action by C. stating himself in the first count to be the agent of A. and averring interest in him; in the second averring interest in himself: held, first, that the policy was good within 28 G. III. c. 56;* secondly, that C. had an insurable interest to the amount of 300*l.*†

THIS was an action upon the case on a policy of insurance, dated the 9th of January, 1797, and made by the plaintiffs by their names and firm of Messrs. Wolffs & Dorville, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, upon goods on board the ship the *Fahrsund's Wharf*, Peter Nicolay Mohr, master, at and from Fahrsund to London, at a premium of six guineas per cent. The defendant underwrote the policy for 200*l.*, there was a total loss by perils of the sea. The first count of the declaration averred that the insurance was made by the plaintiffs as the agents of one Jochum Brink Lund, and for his use and benefit, and that the plaintiffs at the time of making thereof were persons residing in Great Britain, and did effect the policy as such agents, and that the style and firm of Messrs. Wolffs & Dorville inserted in the policy was at the time of making thereof

* On this point the decision was confirmed by the decision of the King's Bench in *De Vignier* v. *Swanson*, reported in the note to *Bell* v. *Gibson*, 1 B. & P. 346 n, and p. 825 n, *post*, and was reiterated by the Common Pleas in the case of *Bell* v. *Gibson*, 1 B. & P. 345, and p. 823, *post*.—R. C.

† See as to the insurable interest of a *factor* (properly so called), extending to the whole property, *Lucena* v. *Crauford*, 2 B. & P. N. R. 269 (reported in 6 R. R.). In *Ebsworth* v. *Alliance Marine Ins. Co.* (1873) L. R. 8 C. P. 596, 624, 42 L. J. C. P. 305, there was much difference of opinion whether the principle of *Lucena* v. *Crauford* applied. But the members of the Court who thought it did not, admitted the principle of an insurable interest in the agent to the extent of his lien upon the principle of *Wolff* v. *Horncastle*.—R. C.

the usual style and firm of dealing of them the plaintiffs, and that Jochum Brink Lund was interested in the goods to the amount insured. The second count averred the interest in the goods to be in the plaintiffs, and that they made the said insurance for and on their own account.

The defendant paid the premium, viz. 12*l.* 12*s.*, into Court upon a plea of tender, which was admitted.

The cause was tried at the Guildhall sittings after Michaelmas Term last, before Eyre, Ch. J. when a verdict was found for the plaintiffs with 187*l.* 8*s.* damages, and 40*s.* costs, subject to the *opinion of the Court on a case, stating, That Jochum Brink [*317] Lund was a merchant resident at Fahrsund in Norway, and had contracted with certain persons in London, carrying on trade under the firm of the Cudbear Company, to supply them with a quantity of moss: that the plaintiffs were the general agents of the said Jochum Brink Lund in London: that the said Jochum Brink Lund having, on the 12th November, 1796, shipped 574 sacks of moss at Fahrsund in Norway, on board the said ship called the *Fahrsund's Wharf*, consigned to the said Cudbear Company in London, and upon their account and risk transmitted to the plaintiff the invoice and bill of lading of the same, in a letter as follows: "The ship *Fahrsund's Wharf* is now loading with a cargo of moss; she will be ready to sail in the course of eight or fourteen days, and usually takes in fifty-six tons; please to hand the enclosed to the Cudbear Company, that these friends may have an opportunity to secure themselves by insuring the moss cargo, the season being so far advanced:" that the goods were by the said bill of lading to be delivered to the said Cudbear Company or order; that on the 10th of December, 1796, the said Jochum Brink Lund drew a bill of exchange on the said Cudbear Company for the amount of the said cargo, 1,112*l.* 8*s.* 2*d.*, at three months sight, in favour of the plaintiffs, and remitted the same to the plaintiffs to procure acceptance thereof, and to place to his credit; and at the same time advised the plaintiffs of his having drawn on them for 300*l.*, which bill for 300*l.* was by the plaintiffs accepted and afterwards paid: that the Cudbear Company, after having received through the hands of the plaintiffs the bill of lading and invoice of the said

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cargo, and having the said bill for 1,112*l.* 8*s.* 2*d.* presented to them by the plaintiffs for acceptance on the 9th of January, 1797, refused to accept the said bill or take to the cargo, or insure the same, and returned the bill of lading and invoice to the plaintiffs: that the plaintiffs thereupon caused the above insurance to be made on the said 9th of January, 1797, without any order so to do, and on the next day by letter informed their correspondent Jochum Brink Lund, that the Cudbear Company had refused to accept the bill or take to the cargo, or make any insurance, and that they the plaintiffs had made such insurance as aforesaid. On receipt of which letter the said Jochum Brink Lund, on the 28th day of January, 1797, wrote a letter to the plaintiffs, containing, among other things, as follows: "it is very
[*318] well you have taken the precaution to insure the moss *cargo, hoping the Cudbear Company at the arrival of the ship will repay the premium; in the meantime I have credited you the amount of it in your account. On the 10th instant Captain P. N. Mohr sailed again, but on account of stormy and contrary winds was obliged to take harbour on the west coasts of Norway in Rasvog, without any damage, intending with the first fair wind to proceed on his voyage; not doubting at his safe arrival you will settle it with the Cudbear Company in such a manner that they, without any further objection, will take and pay the cargo as per invoice. In want of complying with the above I shall be necessitated to commence a lawsuit against the said company, to which I will furnish you with the necessary documents." That the said Jochum Brink Lund was at the time of the said insurance being effected indebted to the plaintiffs in 1,400*l.* and upwards: that the said ship the *Fahrsund's Wharf*, with the said cargo on board, was afterwards lost by perils of the sea in the voyage insured from Fahrsund in Norway to London.

The question reserved for the opinion of the Court was, whether the plaintiffs were entitled to recover? if not, a verdict to be entered for the defendant.

[This question was argued by *Le Blanc*, Serjt. for the plaintiffs, and by *Shepherd*, Serjt. for the defendant.]

BULLER, J.:

This is an action on a policy of insurance made on goods on board the *Fahrsund's Wharf* at and from Fahrsund to London. The policy is made in the names of Wolff & Dorville, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all. This policy in its frame is very much like those which we used to see some years before the Legislature interposed in the 25th Geo. III., only I remember that the words "as interest may appear" were then usually added. The ship sailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* transaction; and no fraud has been suggested; a loss has happened, and the underwriter now chooses to say, that for want of a strict compliance with the 28 Geo. III. he shall be excused from paying the money. Time was, when no underwriter would have dreamed of making such an objection: if his solicitor had suggested a loop-hole by which he might escape, *he would have spurned at the idea. He would have said, Is it not a fair policy? have I not received the premium? and shall I not now, when the loss has happened, pay the money? This would have been his answer, and he would have immediately ordered his broker to settle the loss. If however the defendant can bring his case within the statute, he has a right to do so, and we are bound to give him judgment. But has the defendant brought his case within the meaning of the statute? has he even brought it within the words of the statute? And even if he had brought it within the words and not within the meaning, I should be clearly of opinion for deciding against him? and in so doing I should follow the directions of the statute, which in the last clause says, "every policy and policies of insurance made and wrote contrary to the true intent and meaning of this Act, shall be null and void." The objection is that the statute requires the names or style and firm of dealing of the persons interested, or the names or style and firm of the consignors or consignees of the goods insured, or the names or style and firm of the persons residing in Great Britain, who shall receive the order for and effect the policy, or of the persons who shall give the order or directions

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to the agents immediately employed to negociate or effect the policy to be inserted in the policy. Now it is material to go back to a time previous to the passing of this statute, in order to see what was the real meaning of the Legislature. My brother *Le Blanc* very properly went into a review of the 25 Geo. III. though that Act has been since repealed. By putting the two Acts together we may learn the true spirit and meaning of the last; what it was those who introduced it wished to be effected; and I might add from recollection what it was they professed. The inconvenience recited by 25 Geo. III. was the making policies in blank, and therefore it was enacted, that where they were made by persons residing in Great Britain, the names of the persons interested should be inserted therein, or the names of the persons who should effect the same as agents for the persons interested, and in case of persons residing out of Great Britain, the name of the agent. Under this Act it happened that many persons not understanding the meaning of these provisions, and not complying literally with them, lost the benefit of their policies.† The Legislature therefore thinking that they had drawn the string too tight, recited in 28 Geo. III. "that it
[*322] had been found by experience *that great mischiefs and inconveniences had arisen to persons interested in ships and to persons using commerce, from the 25 Geo. III. c. 44, and that it was expedient that other and more convenient provisions should be made for the regulating insurances on ships, &c. than those contained in the said Act," &c. Now we are bound to say that this second statute must receive the most liberal construction that the words will bear. From the language of the two statutes, as well as the consideration that we are construing a contract *uberrimæ fide*; viz. a policy of insurance, we must avoid bearing harder upon the plaintiffs than is absolutely necessary. Let us see then whether the plaintiffs do or do not come within any of the descriptions of persons in the last statute. These descriptions are four: the consignor and the consignee, the person receiving and the person giving the order. It is perfectly clear that the plaintiffs are not the consignors: but I am by no means pre-

† *Pray* and others v. *Edie*, 1 Term Rep. 313.

pared to say that they are not the consignees. It is true that the goods were originally consigned to another person, but the case must be considered as it stood at different periods: though the Cudbear Company were clearly the consignees at first, it does not follow that they continued to be so. What is a consignee? A consignee is a person residing at the port of delivery, to whom the goods are to be delivered when they arrive there. Lund does not trust the Cudbear Company without securing himself: he therefore sends the bill of lading to the plaintiffs, who are his general agents, in order that he may be secure of being paid for his goods. Certainly if the Cudbear Company had received the goods, they would have been the consignees, but they refused to receive them; then who was entitled to receive them? It cannot be pretended that nobody had the right, and the captain could not keep them: then to whom could the right belong but to the persons who had the bill of lading and were the general agents of the consignor? From the moment that the Cudbear Company refused to have any thing to do with the goods, the plaintiffs became the consignees. If this be so, there is no objection to the policy, and I am satisfied that I do not carry this construction too far when the justice of the case is with the plaintiffs. But there are two other characters mentioned in the statute. The next is the person who receives the order to insure. Let us see therefore whether these plaintiffs had not an order to make insurance. The goods were originally intended for the Cudbear Company; but they were sent, accompanied with a letter *which stated in the clearest terms that [*323] Lund intended that they should be insured. The Cudbear Company having refused to take the goods, could the plaintiffs, who were the general agents of Lund, could any man of sense read his letter, and doubt of his intentions? In giving his reasons he says that the season is so far advanced, that he does not think it safe to send the goods without their being insured. The plaintiffs must therefore have been blind if they had not seen that it was his intention to have them insured. Then what was his interest? Why that they should be insured. It is agreed that a general agent has a right to exercise his discretion for the benefit of his principal: he must act on the spur of the

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occasion, and if nothing else had passed, I have doubts whether the consignor would not have been liable to pay the premium. But the plaintiffs take the opportunity to inform the consignor of their having made the insurance, and he highly approves of their acts,† which brings the case within the maxim that *omnis ratihabitio retrotrahitur & mandato priori æquiparatur.* I am clear therefore that the plaintiffs were the persons who received the order to make this insurance within the description of the Act of Parliament. But there is still another character to be considered; the statute mentions, in the last place, the person who gives the order to make insurance. Now, in my opinion it is impossible to state a case that comes more directly within the Act of Parliament than this. Who were the persons immediately concerned, who immediately employed the broker, who gave the immediate order for insurance, but the plaintiffs? It appearing therefore that they come within the words of the Act of Parliament, the case stands clear of all objections, and is in law, conscience, and justice with the plaintiffs. With respect to the second count, I hold that the plaintiffs had a clear right to insure to the amount of 300*l.*, for which they were interested in the goods. My brother *Shepherd* considers them as standing without interest in the goods, because they had only a debt against Lund. I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest. The case is not at all altered by the goods not having arrived. There is no more common transaction

[*324] *in the city of London than to raise money on the security of a bill of lading and policy: these plaintiffs, having advanced their money on that security, must, if the goods had arrived, have received 300*l.* out of them; the goods being lost, the policy of insurance stands in the place of them, and the plaintiff is entitled to receive that sum under the policy. By my note it appears that the CHIEF JUSTICE, when this case was first moved, delivered a clear opinion in favour of the plaintiffs: on the whole therefore I think the case is most decidedly with them.

† Vid. *French* v. *Backhouse*, and *French* v. *Foulston*, 5 Burr. 2727.

HEATH, J.:

I am of the same opinion. But as my brother BULLER has entered so fully into the case, I shall speak more shortly than I should otherwise have done. This statute was made to prevent unlawful gaming. It is therefore enacted that no persons shall recover under policies of insurance, but those who have either an interest as principals, or have acted as agents. In the first place then I think that the plaintiffs were clearly the consignees of the goods: for the bills of lading were sent to them, and they had a right to take possession. The statute also says, that if the names of the consignor or consignees be not inserted, that of the person giving or receiving the order for the insurance shall be inserted. While the ship is in safety, where is the difference whether the agent insure without order, and the principal afterwards approve of the insurance, or first receive the order and then insure? On the second count it is equally clear, that the plaintiffs had an insurable interest. It is true that if the Cudbear Company had altered their minds and taken to the cargo, that the plaintiffs would have had no interest, but if they had a contingent and reasonable expectation of interest, it was sufficient to entitle them to insure, according to what was held in *Le Cras* v. *Hughes*,† viz. that a certain expectation of receiving property captured for the emolument of the captors, from the Crown, would give an insurable interest.

ROOKE, J.:

I agree in opinion with my brothers. I think that the plaintiffs may be considered as consignees of these goods, and I also think that they may be considered as having received orders from the principal to insure, what they did having been subsequently adopted by him. But there is one ground on which I have no doubt, namely that the plaintiffs come within the last description of persons mentioned in the statute. They are the persons who gave the immediate order, in consequence of which *the policy was effected. The Act of 28 G. III. was made to [*325] remedy the inconveniences which were experienced under the

† E. 22 Geo. III. B. R. Park. on Insur. 269.

WOLFF v. HORNCASTLE.

25 G. III. and therefore we are bound to give it a liberal construction. I think the plaintiffs clearly entitled.

Postea to the plaintiffs.

1798. *Nov.* 19.

[326]

WILLIAMS, EXECUTOR OF ELIZABETH BREEDON, *v.* BARTHOLOMEW.

(1 Bos. & P. 326—329.)

If A. tenant for life subject to forfeiture, remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C., his executor may, on shewing that he acquiesced under a false apprehension recover from C. the amount of the rent erroneously paid to B.

COVENANT for rent. The declaration stated that by indenture dated the 2nd February, 1789, E. Breedon demised certain premises to the defendant, to hold from the 29th of September, 1788, for the term of twenty-one years, determinable at the decease of E. Breedon, at the yearly rent of 130*l.*; that E. Breedon died on the 30th October, 1793, having made the plaintiff her executor; and that on the 29th of September, 1793, five years rent amounting to 650*l.* became due from the defendant to E. Breedon in her lifetime. Breach, that defendant had not paid this sum to E. Breedon in her lifetime, or to the plaintiff since her death.

Pleas. 1st, That the defendant in the lifetime of the said E. Breedon, to wit, on the 29th of September, 1793, paid to the said E. Breedon the sum of 650*l.* being the amount of five years rent of the said term in the said declaration mentioned, ending on that day according to the form and effect of the said indenture, and the defendant's covenant therein; concluding to the country. 2nd, That the premises in question were settled on E. Breedon by way of jointure, at the time of her marriage with S. Breedon, as to the use of the said E. Breedon, for her life, and so long as she should continue sole and unmarried, from and after the death of the said S. Breedon, remainder to his right heirs; that on the 24th of November, 1776, S. Breedon died, and that on the 5th of November, 1786, E. Breedon inter-

married with W. Williams the father of the present plaintiff, whereupon her interest in the premises determined; And this, &c. wherefore, &c.

Replication, taking issue upon the first plea, and traversing the marriage with W. Williams, stated in the second plea; and on this also issue was joined.

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This case came on to be tried before Heath, J., at the Berkshire Summer assizes at Abingdon, when it appeared that the premises were settled on E. Breedon as stated in the second plea; that after the death of S. Breedon she clandestinely married W. Williams at the chapel of the Savoy; but continued to receive the rent for some years, until Dr. Breedon the remainder-man being informed of the marriage, and that she had forfeited her estate thereby, claimed the rent of the defendant, who accordingly paid it to him for the five years in question, with the knowledge and acquiescence of E. Breedon. It was proved in answer to the second plea, that at the time of the intermarriage of E. Breedon with W. Williams, he had another wife living. A question being raised, whether these facts would support the first issue, HEATH, J. was of opinion that they would not, and accordingly under his direction a verdict was taken for the plaintiff, but if the Court should be of opinion that payment by the defendant to Dr. Breedon under the above circumstances proved the first issue, then a verdict on that issue to be entered for the defendant.

A rule *nisi* having been obtained for this purpose on a former day,

Le Blanc and *Shepherd*, Serjts. now shewed cause:

The only question here arises on the first issue, it having been clearly proved under the second, that the marriage of E. Breedon with W. Williams was void. The payment in this case was made to Dr. Breedon under a mistake; not as agent to E. Breedon, nor under the idea of her having directed it. Had Dr. Breedon been steward to E. Breedon the payment might then have been considered as made to her: but, this was an adverse payment to a person who claimed the rent as his own upon false grounds. If tenant in fee make a lease and die, and A. B. enter

WILLIAMS v. BARTHOLOMEW.

and receive the rents before the heir-at-law is aware of his title, the tenant shall not defend himself in an action for rent brought by the heir-at-law, by saying that he has already paid the rent to A. B.

Williams, Serjt. for the defendant:

It is true that payment of rent by the tenant to a person who claims adversely without the knowledge of the party having the right to it cannot be supported. But I contend that the circumstances of this case amount to evidence *to be left to a jury, that [*328] the rent was paid by the direction of E. Breedon, which would make it a payment to herself. The payment to Dr. Breedon under an idea on all sides that he was entitled to the rent, amounts to an agreement on the part of E. Breedon, that it should be paid to him. Where a mortgagee or obligee agrees that the mortgagor or obligor shall pay the interest to a scrivener, it is a good payment, though he has neither the custody of the mortgage, nor the bond. *Whitlock* v. *Waltham*, 1 Salk. 157. Suppose E. Breedon had said to the defendant, "I have forfeited the estate, and you must pay the rent to Dr. Breedon;" the payment would have been protected: now if her conduct amount to a confirmation of the payment, it must have the same effect, according to the maxim that *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. This cannot be called a voluntary payment by the tenant, for if Dr. Breedon had distrained and avowed in replevin for rent in arrear, what plea in bar could the tenant have set up? Nor was it a payment by mistake, having been made with the knowledge of the lessor, to whom all the fault and laches must be imputed.

BULLER, J.:

If money be paid to A. by the direction of B., it is a good payment to B.; but I can never agree that if money be paid to A. simply with the knowledge of B., it will be a payment to B. Suppose that one disseises another of an estate and continues in possession of the rents and profits with the knowledge of the disseisee, will anybody say that the disseisee, shall not recover against the tenant? Knowledge will not do, there must be

consent, direction, and authority. Here there clearly was no order. This poor woman thought that she was not entitled to the rent: Dr. Breedon therefore obtained it in spite of her, in consequence of her persuasion that she was not entitled. If she allows Dr. Breedon to receive the rent under the idea that she has no right, how can we conclude from that circumstance, that she would have done the same if she had been apprised of her right? It has been argued, that if Dr. Breedon had distrained and avowed in replevin, the tenant could have made no answer; but I see no difficulty in that. Every tenant is bound by his attornment; the defendant might have pleaded that he did not hold as tenant to Dr. Breedon; and if Dr. Breedon had said "You have attorned to me;" the defendant might have answered "I did that on your misrepresentation, who claimed as remainder-man;" and might have shewn, that Mrs. Breedon was still alive and entitled. *If Mrs. Breedon had ordered the [*329] defendant to pay the money to Dr. Breedon, the payment could never afterwards have been questioned. The tenant in that case would have had nothing to do with any transaction between Mrs. Breedon and Dr. Breedon, be the title what it might: if he had obeyed the order of Mrs. Breedon, it would have been a payment to her agent. The next question then is, whether there be anything in Mrs. Breedon's conduct which amounts to a confirmation of the payment? Now, to constitute that, some act must appear to have been done by her with knowledge of her own situation. Here a right to the rent was insisted upon by Dr. Breedon; and Mrs. Breedon, being deceived both in point of law and fact, acquiesced in the payment of that rent to another to which she was entitled. Her right, therefore, stands as it did before Dr. Breedon, whose claim was clearly adverse, received any rent at all.

HEATH, J.:

I continue of the opinion which I held at the trial. It does not seem to me that the defendant was under any peculiar difficulty. He might have had recourse to a bill in equity to be indemnified. What was said by my brother *Shepherd* struck me very much. Suppose a lease made, and a person claim as heir-

WILLIAMS c. BARTHOLOMEW.

at-law, to whom the rent is paid; and afterwards the true heir at-law is discovered, will it be said that he shall not recover?

ROOKE, J.:

The tenant having taken a lease from Mrs. Breedon, must answer for the defect of rent. She made a mistake, and thought her title at an end when it was not; the mistake was afterwards discovered, and her executor is therefore now warranted in recovering the rent from the tenant.

Rule discharged.

1798.
Nov. 19.

BELL *v.* STONE.

(1 Bos. & P. 331—332.)

[331]

A letter written to a third person calling plaintiff "a villain," held actionable, without proof of special damage.

ACTION on the case for defamation. The first count of the declaration, after stating that the plaintiff was a land-surveyor, averred that the defendant, intending to injure him in his reputation and hurt him in his profession, wrongfully and maliciously wrote and published a certain scandalous, malicious, and defamatory libel, in the form of and as a letter addressed to one N. B. to whom the defendant was indebted in a large sum of money, in which letter was contained, of and concerning the plaintiff, the following matter: "After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable, and how they can be connected with him is the most astonishing thing to me; Mr. H. writes me you called upon him (meaning the plaintiff) on the subject of your account, for which the villain gave you his note at five months;" that the defendant in further prosecution of his said malice sent the said letter to the said N. B. to the great hurt, prejudice, and injury of the plaintiff, and to his great discredit and disgrace. There

were other counts on words spoken in derogation of the plaintiff's professional character, and of his ability to pay his debts. The conclusion, referring to all the counts, stated that the plaintiff suffered special damage in consequence of publishing the said libel and speaking the said words, viz. that he was arrested by the said N. B. for the sum which he owed to him, and that he lost his business, &c.

Plea. The general issue.

This came on to be tried at the Bedford Summer assizes, when, the plaintiff having failed in proving the special damage laid, MACDONALD, Ch. B., was of opinion that the letter on which the first *count proceeded, unsupported by proof of special damage, [*332] was not actionable, and directed a verdict for the defendant. The counsel for the plaintiff, however, contending that the letter itself was actionable, the Chief Baron asked the jury what damages they would give supposing the plaintiff entitled to a verdict in point of law. The jury answered 1*s.*

Sellon, Serjt. on a former day obtained a rule to shew cause why the verdict for the defendant should not be set aside, and a verdict be entered on the first count for the plaintiff for 1*s.*, on the ground that though the words in the first count might not be actionable, if only spoken, yet that being committed to writing, they were so.

Le Blanc, Serjt. was this day to have shewn cause,

But the COURT expressing themselves clearly of opinion that any words written and published, throwing contumely on the party, were actionable, *Le Blanc* declined arguing the point, and the

Rule was made absolute.

1798.
Nov. 24.

[340]

LLOYD *v.* JOHNSON.

(1 Bos. & P. 340—341.)

Plaintiff was employed to wash clothes for defendant who was a prostitute, knowing her to be such; and held that the use to which the clothes might be applied, could not bar plaintiff of an action for work and labour.†

INDEBITATUS ASSUMPSIT for work and labour done, and on the common money counts. Plea, *Non assumpsit.*

At the trial before Rooke, J. at the Westminster sittings in this Term, it appeared by the evidence of a servant maid of the defendant, (who was also a daughter of the plaintiff,) that the defendant was a prostitute, and that this action was brought to recover the amount of a bill delivered for washing done by the plaintiff's wife. By the bill of particulars it was shewn that the articles washed, consisted principally of expensive dresses, and that there were also some gentlemen's night-caps; the witness swore that the former were for the purpose of enabling the defendant to appear at public places, and that the latter were worn by those persons who slept with her mistress. She also proved that the plaintiff and his wife had full knowledge of the defendant's situation, and of the purposes to which the articles in question were applied. The learned Judge, on an objection taken to the plaintiff's recovery under these circumstances, was of opinion, that no such immorality in the contract on the part of the plaintiff had been proved, as ought to defeat the action.

Verdict for the plaintiff.

Cockell, Serjt. now moved for a rule to shew cause why the verdict should not be set aside and a nonsuit be entered, and cited *Crisp* v. *Churchill*, E. 34 Geo. III. coram Eyre, Ch. J., where in an action for use and occupation of a lodging, it being set up that the defendant was an infant and a prostitute, the CHIEF JUSTICE was of opinion that those circumstances were no bar to the action, as both an infant and a prostitute must have a lodging; but it being *shewn that the lodging was let to the defendant for purposes of prostitution, and with a knowledge on

[*341]

† Vide *Bowry* v. *Bennet*, 1 Campb. 348; *Webb* v. *Brooke*, 3 Taunt. 6; *Pearce* v. *Brooks* (1866) L. R. 1 Ex. 213, 35 L. J. Ex. 134.—R. C.

the part of the plaintiff of that fact, he held that the action was not maintainable.* LLOYD v. JOHNSON.

BULLER, J.:

What do you mean by the expression of clothes used for the purposes of prostitution? This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the defendant to an improper purpose, and which were not. As to the case before my Lord Chief Justice, I suppose the lodgings were hired for the express purpose of enabling two persons to meet there, which would certainly be unlawful. Here the plaintiff's wife was employed generally to wash the defendant's linen, and the use which the defendant made of it cannot affect the contract.

HEATH and ROOKE, Justices, being of the same opinion,

Cockell took nothing by his motion.

BELL AND OTHERS *v.* GILSON.

(1 Bos. & P. 345—356.)

1798. *Nov.* 26.

[345]

If the name of the broker effecting a policy of insurance be inserted in the policy as "agent," it is a sufficient compliance with the 28 Geo. III. c. 56.

THIS was an action on a policy of assurance underwritten by the defendant on the 8th December, 1797, for 200*l.*, on goods shipped on board the *Elizabeth*, Captain Spewce, from Rotterdam to Hull, at a premium of two guineas and a half per cent. The first count of the declaration stated that the plaintiffs caused to be made the policy of assurance, purporting thereby and containing therein that Barrett & Co. agents, the names of Barrett & Co. being the usual style and firm of dealing of the persons residing in Great Britain, who received the order for and effected the said policy of assurance, as well in their own

* *Vid. etiam Girarday* v. *Richardson*, Espin. Cas. N. P. 13, where the same point was ruled by Lord KENYON at the Westminster Sittings after Easter Term, 33 Geo. III.

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names, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance, &c.; and the said first count averred the interest to be in the plaintiffs, and that the insurance was made on their account, and for their use and benefit; that the ship sailed on the voyage insured with the goods on board, and that in the course of that voyage she was captured by the French, and the goods and the voyage lost. There were also counts for money had and received, and money paid. The defendant pleaded the general issue *non assumpsit* on which issue was joined; and paid the premium into court on the count for money had and received.

This cause came on to be tried by a special jury at the last sitting in Trinity Term at Guildhall, before Eyre, Ch. J., when a verdict was found for the plaintiffs for 194*l.* 15*s.*, subject to the opinion of the Court on the following case:

The plaintiffs, being British merchants resident in London, gave orders to Messrs. Barrett & Co. insurance-brokers (also
[*346] resident *in London) to effect the policy in question, who as brokers effected the same in their own name and usual firm of Barrett & Co., describing themselves therein agents. [The case then stated facts from which it appeared that the insurance was on goods purchased by a British subject in an enemy's country, and shipped for this country on his own account in a neutral vessel.]

The questions for the opinion of the Court were, 1st, Whether the name of Barrett & Co., agents, inserted in the policy, were a sufficient compliance with the stat. 28 Geo. III. c. 56? 2ndly, Whether the said insurance on the said goods were legal?

[346—351] [Upon the latter point the judgment of this Court, which was in favour of the plaintiffs, was overruled by the decision of the King's Bench in error, in the case of *Potts* v. *Bell*, 8 T. R. 548, reported *in loco post*. The judgment of the Court upon the former question was as follows:]

[351] BULLER, J. (after stating the case):

On this case two questions have been raised; 1st, whether the policy which is described to have been made by Barrett & Co.

as agents sufficiently complies with the 28 Geo. III.? I think this question ought now at least to be quite at rest, two decisions having been already made upon this subject within the Term; one in this Court,* and one in the King's Bench;† both of which are directly in point. It may be material to remember, that previous to the passing of the 25 and 28 G. III. many objections were made by the merchants, that policies in their frames were so loose and incorrect, that an underwriter had no opportunity of knowing the nature of the thing insured, or the persons were for whom he insured. Great inconvenience arose, as appears by the preamble of one of the statutes,‡ from the circumstance of many policies being made in blank, in consequence of which the underwriters were not led to the knowledge of any of the parties. I remember it was the conversation both in Westminster Hall and out of that place, that the underwriters wanted to know the name of somebody concerned, though it was not so material who that person should be. And why was this? It was because though they might not know the name of the principal, yet if they were in possession of the name of the person who brought forward the policy, they might have some confidence, that if that person was a merchant of character, or a respectable

* *Wolff* v. *Horncastle*, 1 B. & P. 316, p. 808, *ante*.

† *De Vignier* v. *Swanson*, B. R. Nov. 16th, 1798. Action on a policy of assurance effected in the name of Grandclos Mesle & Co., who were brokers to the plaintiff, and also agents to her in several money transactions. The plaintiff, as well as Grandclos & Co., resided in London. The latter were not called agents in the policy, but in the declaration were stated to be "the persons residing in Great Britain who received the order for and effected the said assurance." Interest in the plaintiff was averred. A verdict was found for the plaintiff, and a rule *nisi* for a nonsuit obtained, on an objection to the form of the policy as not sufficiently complying with the 28 Geo. III. c. 56, because effected in the name of Grandclos & Co., without stating them to be agents. This point was to have been argued this day, but Lord KENYON said he was surprised to find the rule had been drawn up, as there was nothing in the case. Accordingly the rule, without argument, was discharged.

‡ 25 Geo. III. c. 44. Whereas it hath been found by experience that the making or effecting insurances on ships or vessels, and on goods, merchandizes, and effects in blank, and without specifying therein the name or names of any person or persons for whose use and benefit, and on whose account such insurances are made and effected, hath been in many respects mischievous, and productive of great inconveniences, for remedy whereof, be it enacted, &c.

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broker, he would not be engaged in a dishonest transaction; such as I remember to have been not unfrequent in the course of the last war; viz. the insurance of ships and cargoes, which were only carried out for the purpose of being sunk. In this case the wish of the underwriters has been complied with, as well as what the Legislature thought fit to direct; for the name of the person immediately employed to effect the policy has been inserted. The case in the King's Bench goes farther than this, for there it was not even stated in the policy that the parties were agents, but only averred in the declaration that they were so; whereas here it is expressly said in the policy that Barrett & Co. effected the policy "as agents," by which is imported that they acted not on their own account, but on the part of somebody for whom they were concerned.

[The remainder of the judgment dealt with the latter question.

[352—356] HEATH, J. and ROOKE, J. concurred.]

Judgment for the plaintiff.

C. P. HILARY TERM.

1799. *Feb.* 9.

WHALLEY *v.* TOMPSON AND ANOTHER.

(1 Bos. & P. 371—376.)

[371] One being seised in fee of the adjoining closes A. and B. over the former of which a way had immemorially been used to the latter, devises B. with the "appurtenances;" held that the devisee cannot under the word "appurtenances" claim a right of way over A. to B., as no new right of way is thereby created, and the old one was extinguished by the unity of seisin in the devisor.†

TRESPASS for breaking and entering the plaintiff's close.

Pleas. 1st, Not guilty. 2nd, That long before the said times when &c. and long before the said plaintiff had any thing in the said close in which &c. (to wit) on the 20th day of March in the year of our Lord 1753, one Thomas Adderley Esq. was at one and

† As to grant with *ways, &c., occupied and enjoyed*, see *Kay* v. *Oxley* (1875) L. R. 10 Q. B. 360, 44 L. J. Q. B. 210; *Barkshire* v. *Grubb* (1881) 18 Ch. D. 616, 50 L. J. Ch. 731.—R. C.

the same time seised as well of two closes situated in the parish of Weddington aforesaid formerly called the Wood Close and Ox Close and lately divided into four pieces and now known by the name of Little Leyfield and Ox Meadow as of and in the said close in which &c. in his demesne as of fee and that the said Thomas Adderley and all those whose estate he then had in the said close *formerly called the Wood Close and Ox Close [*372] and now called Little Leyfield and Ox Meadow from time whereof the memory of man is not to the contrary had used and enjoyed and was used and accustomed to have use and enjoy and the said Thomas Adderley had used and enjoyed by his farmers and tenants a certain way from the King's highway in the parish of Weddington aforesaid leading from Nuneaton in the county aforesaid to Atherston in the said county unto into through over and along the said close in which &c. to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow and from thence back again by the same way to the said common highway for himself and themselves and his and their tenants and his and their servants to pass and repass on foot and with their cattle carts and other carriages at all times as occasion required as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow And the said Thomas Adderley being so seised as well of the said close in which &c. as of the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow and so having using and enjoying the said way as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow afterwards (to wit) on the same day and year last aforesaid at Weddington aforesaid in the county aforesaid did duly make and publish a certain codicil to his last will and testament the said codicil being in writing and duly executed to pass real estates and did thereby (amongst other things) give and devise the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with their and every of their appurtenances to the use of his sister Elizabeth Liptrott for and

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during the term of her natural life remainder to Amicia Bracebridge the then second and youngest daughter of Philip Bracebridge Clerk and the heirs of her body, remainder to the right heirs of the said Philip And the said Thomas Adderley afterwards and before the said times when &c. (to wit) on the 15th day of February in the year of our Lord 1757 at Weddington aforesaid died, not having revoked or altered his said codicil and so seised as aforesaid as well of and in the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with the rights members and appurtenances thereunto belonging as of and in the said close in
[*373] *which &c. upon whose death the said Elizabeth Liptrott by virtue of the said devise afterwards and before the same times when &c. (to wit) on the same day and year last aforesaid entered into the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow together with all the rights members and appurtenances thereunto belonging so devised to her as aforesaid and was thereof seised for and during the term of her natural life and had used and enjoyed by her farmers and tenants the said way as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow (to wit) at Weddington aforesaid in the county aforesaid and the said Elizabeth Liptrott being so thereof possessed and so using and enjoying the said way afterwards (to wit) on the second day of March in the year of our Lord 1765 at Weddington aforesaid died, whereupon the said Amicia Bracebridge afterwards and before the said times when &c. (to wit) on the same day and year last aforesaid entered into the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow together with all the rights members and appurtenances thereunto belonging so devised to her as aforesaid and became seised thereof to her and the heirs of her body, and had used and enjoyed by her farmers and tenants the said way as an easement and appurtenance belonging to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow (to wit) at Weddington aforesaid in the county aforesaid. And the said

Amicia being so seised as aforesaid and so using and enjoying the said way afterwards (to wit) on the 19th day of September in the year of our Lord 1769 at Weddington aforesaid in the county aforesaid intermarried with one George Hemming Esquire whereby the said George and Amicia in right of the said Amicia became and were and still are seised of and in the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with all the rights members and appurtenances thereunto belonging to the said George and Amicia and the heirs of the body of the said Amicia, and had used and enjoyed by their farmers and tenants the said way as an easement and appurtenance belonging to the same And being so thereof seised and so using and enjoying the said way as last aforesaid the said George afterwards and before the said times when &c. (to wit) on the first day of January in the year of our Lord *1796 demised the said closes formerly called the [*374] Wood Close and Ox Close and now called Little Leyfield and Ox Meadow with all the rights members and appurtenances thereunto belonging to one Thomas Tompson the elder, who thereupon entered into and became and still is possessed of the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow together with all rights members and appurtenances thereunto belonging and held used and enjoyed the same way as aforesaid and being so possessed thereof the said defendants as servants of the said Thomas Tompson the elder and by his command at the said several times when &c. passed and repassed on foot and with horses mares geldings carts and other carriages from the said King's common highway in the said parish of Weddington unto into through over and along the said close in which &c. to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow and from thence back again by the same way to the said common highway as occasion required using the said way as an easement and appurtenance to the said closes formerly called the Wood Close and Ox Close and now called Little Leyfield and Ox Meadow as it was lawful for them to do for the cause aforesaid. And this &c. wherefore &c.

WHALLEY v. TOMPSON.

General demurrer and joinder.

Le Blanc, Serjt. was this day to have argued in support of the demurrer on these grounds, viz. that T. Adderley could not prescribe for a right of way over his own soil; that he could not have the way as an easement or appurtenance belonging to one close while he was seised in fee of both, since whatever right of way might have existed while the closes were separate property was extinguished by the unity of seisin;† that being extinguished therefore it did not exist as a right of way, easement, appur-

[*375] tenance or *any species of property corporeal or incorporeal, which could pass by the will of T. Adderley under the word "appurtenances" supposing that word to be sufficient to carry it; that not being stated as a way of necessity it could not be raised by operation of law: and not being given by express words the devisee could not take it as a new grant.

Williams, Serjt. *contrà* (being called upon by the Court, who inclined against the plea in bar, to state the grounds on which he meant to defend it):

The Court will not on a general demurrer, take notice that this right of way in T. Adderley is informally pleaded viz. by way of prescription. The averment in substance amounts to

† See this position supported by several cases collected in Vin. Abr. Extinguishment (A. & C.) But it appears that there is a distinction between rights which are of necessity and those which are merely by way of easement; the former are not destroyed by unity of seisin; as a way to church or market, 1 Rol. Abr. Extinguishment, 936, *l.* 1; *Sury* v. *Pigot*, Poph. 172, per DODDRIDGE, J.; 3 Bulst. 340, S. C.; Noy 84, S. C.; or a gutter carried through an adjoining tenement, 11 H. VII. 25; or a water-course running over the adjoining lands, *Sury* v. *Pigot*, Poph. 166; Latch. 153, S. C.; 3 Bulst. 340, S. C., though that is also said to be because it hath its being not by prescription, but *ex jure naturæ*, per WHITLOCK, J. S. C. So things not issuing out of lands as parts of the profits, but due in another respect, though taken within the lands, are not extinguished by unity of possession, Dav. 5, 6, as warren, 35 H. VI. 55, 56; Dyer, 327; franchises, waife, stray, wreck, leet, &c. Nor things which are part of the profits of the land and payable by such person only who has the land, if they commence upon any personal respect, and not in respect of the land, and so that the person only is charged, and not the land, as annuities, tithes, proxies, &c. Dav. 5, 6.

this; that T. Adderley for a long time previous to the devise used a way over the *locus in quo*, to the close devised, as an easement and appurtenance to the latter. By the devise therefore of "Leyfield and Ox Meadow with their and every of their appurtenances" the way in question may well pass; the word "appurtenances" being clearly sufficient to carry a right of way. Plowd. 170. Suppose a man being possessed of two closes with a causeway leading over one into the other, alienate the latter; after which the alienee use and enjoy the causeway for forty years; would he not have obtained a good right of way? Such a user would be sufficient evidence to support an action on the cause by the alienee, for any interruption of that right. Now in this case the devisor died in 1757; the devisee for life entered and enjoyed the way till his death, upon which the remainder-man entered and has enjoyed it from that time to this. Then is it consistent to say, that the defendant might maintain an action for the interruption of this way, and yet that he cannot use it without being subject to an action?

EYRE, Ch. J.:

There can be no doubt that the word "appurtenances" may convey an existing right of way. But from the moment that the possession of two closes is united in one person, all subordinate rights and easements are extinguished. The only point therefore that could possibly be made in this case is, that the ancient right which existed while the possession was distinct was merely suspended, and may revive again. If it be stated, that a man and his ancestors have been in possession of two adjoining closes, and a prescription be then set up for a way over one to the other, that prescription will be *felo de se*.—If indeed the fields were let to different tenants, and from time immemorial a causeway had been built over one field to the other, by which the tenants had passed and repassed, this in user and in fact would be a road, but there would be no right to a road in point of law, for no right could exist in the owner independent of the fee-simple. If an alienation of one of the closes was to take place, and the alienee were afterwards allowed

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to use the causeway, a right might possibly grow out of such user to him; but that is not the case on this record, and unless the claim of these defendants can be put in some legal form it will not avail them. Circumstances thrown into the record, which might possibly be sufficient to support an action on the case, will not necessarily be an answer to an action of trespass. I admitted, during the argument, that the word "appurtenances" would carry any easement or legal right. Upon that it was observed, that if the road in question had been described in the devise it would have passed: and that observation was followed up by a question, Whether the word "appurtenances" would not carry any easement or right that would pass by a particular description? To which I answer, that its operation must be confined to an old existing right, and that if the right of way had passed in this instance it must have passed as a new easement.* Had the devise been "with the way now used" it would certainly have been a devise of the close A. with an easement newly created. The word "appurtenances" in this will had nothing to operate upon.

Per CURIAM:

Judgment for the plaintiff.

* A way to a mill having been extinguished by unity of possession in J. S., he died; whereupon partition was made between his daughters; the mill and way were assigned to one and the land to the other: held that the way was revived: *tamen videtur* that it is a new way. Bro. Abr. Extinguishment, pl. 15.

IN CHANCERY, BEFORE LORD HARDWICKE, CHANCELLOR.

LORD ABERGAVENNY *v.* THOMAS.

1739.
May 21.

(EASTER TERM, 12 GEO. II.)

(3 Anstr. 668—669, *n.**)

[668 *n.*]

A copyholder for lives cannot set up a custom to renew except on payment of a fine certain.

THE plaintiff, as lord of the manor of Ewey Lacey in Monmouthshire, brought his bill for a discovery of what lands in the defendant's holding were copyhold, and what freehold; and to have a commission to distinguish them, and that he might be let into the possession of the copyholds which were held by the defendant's father, under a copy for three lives, and which lives were all dropt. Defendant by his answer insisted, that by the custom of the manor the heir was entitled to have a new copy for three lives, and so on for ever, paying to the lord a reasonable fine: upon the hearing of the cause there did not appear any evidence to support this custom, and if there had, the LORD CHANCELLOR declared it to be a void custom; he admitted there might be a custom in a manor for the heir of such a copyholder to have a new copy, paying a fine certain, but not upon payment of a reasonable fine; he said, that originally all copyholds were only estates at will, but that in favour of copyhold estates the law by length of time, and by custom, had established their tenures, and had not put them under the will of the lord so long as they kept the custom of the manor, and therefore in the case of copy-

* This case is printed in a note to *Wharton* v. *King* (3 Anstr. 659-675), in which the decision of Lord HARDWICKE, as well as that of the House of Lords in the case of the *Duke of Grafton* (reported in Brown's Parliamentary Cases under the head of "Copyholds"), are followed by the Chief Baron MACDONALD. The report of *Wharton* v. *King* goes minutely into the evidence offered in that case, but the judgment adds nothing in point of principle to that on the more important authority of Lord HARDWICKE. The note of *Abergavenny* v. *Thomas* is here reproduced from Anstruther, as being, with the exception of a brief note in a later edition of Equity Cases abridged, the only extant report of this judgment. —R. C.

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holders of inheritance, if the custom had not settled any certain fine, the law interposed and prevented the lord from taking more than two years' value: but this he said was applicable only to copyholds of inheritance, and that copyholds grantable for lives only, if the fine was not certain, were like leases of freehold lands for lives, and renewable only upon the best terms the party could make; he mentioned the case of the Duke of Grafton and his tenants for the manor of Grafton, where the copyholds being granted of lives, the tenants, as in this case, set up a custom of renewal on payment of a reasonable fine, not exceeding a [*669] particular sum; the Lord *Chancellor KING directed an issue to try such a custom, but the House of Lords reversed the decree, because they said that a copyholder in this way, by looking into ancient rolls, and seeing what was the greatest fine that ever was taken, might at any time set up a custom of renewal, paying a reasonable fine not exceeding such a sum, though each particular fine had been settled by agreement.

In another note of this case, also produced in the argument,† there is the following addition to the case:

Tamen nota; it was proved that there had been a proclamation in the lord's court for the heir to come in and renew, or shew cause why the lord should not enter upon the estate as his own.

Sed per CANC. That is no proof of a tenant's right of renewal; it was done only in order to prefer the heir before any other in case he will agree for the renewal; and the person who has been steward above twenty years, swears he never knew any tenant insist on such right before the present defendant.

† *I.e.* of the principal case (*Wharton* v. *King*), reported in Anstruther.

EXCH. HILARY TERM.

HARE *v.* GROVES, AND OTHERS.

(3 Anstr. 687—699.)

1796.
Feb. 22.

Serjeants' Inn Hall.

[687]

A tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent, notwithstanding the premises are destroyed by fire.

THE defendant Groves, in 1786, leased to the plaintiff Hare (a brewer) an inn and out-houses, with about ten acres of ground on Woolwich Common, for twenty-one years, (determinable at the will of the tenant, at the end of seven or fourteen years), at 100*l.* a year; the plaintiff binding himself by an express covenant for the due payment of the rent, and to keep and leave the premises in repair, damage by fire only excepted; and the landlord to have a right of entering to inspect the state of the premises. In 1792, the plaintiff underleased to the defendants Harford and Taylor, brewers, they indemnifying him from all demands of rent.

The tenant of these premises, under Harford and Taylor, becoming insolvent, and the house remaining unoccupied for a considerable time, they afterwards underleased to the Polygraphic Society (for imitating paintings,) who made use of it for boiling and preparing oils and varnish, and for painting their pictures, and other purposes of their manufacture: in the course of which, the house was rendered totally unfit for an inn or dwelling-house, the floors being all stained, and most of the windows shut up. It was also necessary to keep such excessive heat in the rooms, by furnaces in each, that the hazard to the building from fire was considerably increased; and no person lived in the house.

In 1793, the house was consumed by fire; the stables and outbuildings were not damaged. The plaintiff soon afterwards applied to the defendant Groves, to rebuild the premises, or to accept a surrender of the lease. Groves refused to do so, and commenced an action at law, on the covenant, for non-payment of rent accruing subsequent to the fire. This bill was filed for an

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injunction, and to compel Groves either to accept a surrender of the lease, or to rebuild the premises.

Burton and *Cooke* for the plaintiff insisted, that the claim of the landlord, though good at law, (*Belfour* v. *Weston*, 1 T. R. 310,†) was yet against an established rule of equity. The first case in which this was so decided, was *Brown* v. *Quilter*, Amb. 621. Lord NORTHINGTON there held, that, by the equitable construction of such a covenant, the tenant is not bound to pay rent for a house which no longer exists, and which he is not bound to rebuild. The same construction was adopted by the same Chancellor, in a subsequent case of *Campden* and *Morton*, and by Lord BATHURST in *Steele* v. *Wright*, 1773.‡ And this doctrine in equity has been recognised by Lord KENYON, when deciding the contrary to be the rule of common law. *Weigall* v. *Waters*, 6 T. R. 489; *Belfour* v. *Weston*, 1 T. R. 310. If this be the regular and fixed construction of such a covenant, in courts of equity, nothing dehors the lease can vary it. If the tenant has either made an improper application of the premises to an use by which the hazard from fire is increased: if by his negli-

[*689] gence, or *even by design, the premises are burned, the landlord has his remedy by an action of waste, or otherwise; but this cannot give a right to recover rent for that which does not exist.

But, in fact, no improper use has been made of the premises, to the extent of fixing the tenant with responsibility for the loss. It was not stipulated in the lease that the house should continue to be used as an inn, nor is it always in the power of the tenant that it should, as the justices may refuse to renew the licence. To convert it to a manufactory, is the most obvious and probable use of such a building; and there are many trades and manufactures in which the danger of fire is as much increased as in the present; at least the Court cannot decide it to be uncommonly hazardous, without an issue.

But the landlord has precluded himself from this defence. He was a builder living in the neighbourhood. He has seen this change of the use of the building, and might at any time enter under the covenant to inspect the state of the premises; if waste

† 1 R. R. 210. ‡ Cited in *Doe* v. *Sandham*, 1 Term Rep. 708, 1 R. R. 371.

was committed he might re-enter it, either at common law, or by virtue of his covenant; by lying by for so many years, he has encouraged us not to object to the use the premises have been put to by our under-lessees, and is therefore to be considered as having given a licence to this use of the premises.

Plumer and *Stanley* for the defendant Groves:

The decision in *Brown* v. *Quilter* by no means establishes the construction contended for by the plaintiff. If that construction were to hold, the lessee would *always find it his interest to burn [*690] the house, in order to get quit of the rent, after letting the premises become untenantable for want of repairs. It is not there held that the landlord is bound to repair on such a covenant, for he may elect to accept a surrender of the lease. The idea there thrown out, that the thing leased is gone by the fire, is not true in fact in either case; for there the tenement remained so valuable that the lessee would not surrender, and here the out-houses and land are still of considerable value. If one of the out-houses, of trifling value, had been consumed by fire, that would have been, like this, a partial loss; and the tenant would equally have been entitled to compel the landlord either to rebuild it, though not bound by the covenant so to do, or to accept a surrender of the whole lease, however advantageous it might be to the landlord.

It may well be questioned, therefore, whether the opinion of Lord NORTHINGTON in *Brown* v. *Quilter* is well founded. The rule of law is clear that the lessee must abide by his covenant for the payment of the rent in the event which has happened; and it is contrary to the general spirit of equity to change the effect of a contract from that which the parties themselves here entered into. That case was not decided according to the opinion of Lord NORTHINGTON, for the tenant refused to surrender his lease, and his bill was dismissed. The other cases mentioned are not in print, nor is any note of them produced; those determinations may have rested on special circumstances; the *obiter dictum* of Lord KENYON cannot give much weight to the argument, as he was then determining the contrary to be the rule of law, and *was not considering the case upon the grounds [*691]

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of equity. In the late case of *Waters* v. *Wiegall*,† in this court, the rule was not acted upon as a fixed principle of equity.

In this case the equity, if any, is rebutted by the conduct of the lessee in the use to which the premises have been applied. The ground upon which *Brown* v. *Quilter* proceeded, was, that the parties, by exempting the tenant from liability to rebuild in the case of fire, had agreed to consider that in the same light as if the premises had been swallowed up by the sea. This however supposes that the accident happens without default of the tenant. In the present case, the tenant, if not guilty of actual fraud, at least cannot be considered as free from blame. Suppose the landlord to have subjected himself to the risk of loss by fire; the risk he has agreed to stand to is that incurred in the occupation of the premises as an inn, and the rent is probably proportioned to the extent of this risk. If a common insurer had agreed to take the same risk upon himself, there can be no doubt that a change in the lading of a ship, or in the use to which a house is applied, by which the danger is materially increased, will avoid the insurance; the use of the premises might be changed, but not so as to increase the risk run by the landlord.—By underleasing to the Polygraphic Society, the tenant probably got an increased rent by subjecting the house to greater risk, and is therefore receiving the premium for the additional risk which
[*692] the landlord incurs. It is also in evidence that no *person slept in the house, and the fires were continued all night without any person to watch them. The care ought to be increased with the risk, otherwise the tenant is guilty of that degree of negligence which is viewed by the law in the same light as actual fraud, and which avoids every equity that the plaintiff might otherwise be entitled to set up.

Burton in reply contended, that the relief given by courts of equity in cases like the present was similar to the jurisdiction exercised in cases of penalties of bonds, mortgages, and other contracts, which are construed at law according to the express agreement of the parties; but, in equity, the consideration given, and the fair recompense to be obtained for it, are the principal

† Vide 2 Anstr. 575.

rules in estimating the claims of the parties. It is unjust that the tenant should pay rent for a house which does not exist; unless, by agreeing to repair, in such an event he precludes himself from the general equity.

MACDONALD, Chief Baron:

The present question is obviously one of that description upon which a court of equity ought peculiarly to pause. The question is of great importance, from the generality of that kind of covenant which gives rise to this suit: and it acquires additional consequence, because it calls upon a court of equity to fix the boundaries to its own power and jurisdiction in interfering in the contracts of individuals.

It is clear that at law the tenant is bound, by the legal construction of this lease, to pay his rent during the continuance of the term, notwithstanding the *event which has taken place. [*693] Equity is called upon to interpose, to prevent the operation of this legal construction, upon the ground that the loss ought in such cases to fall upon the landlord instead of the tenant: we are called upon to relieve from the burden of this misfortune, one party who is liable at law to bear it, and to lay it upon another innocent party who is not otherwise liable.

It will be material to consider how far this doctrine might be pushed, upon the same reasoning adduced in support of the present claim. If the thing levied is destroyed or materially damaged by floods,† or tempest, or any other inevitable accident, the same equity might be insisted upon.

It may well be questioned whether there is any real resemblance in the present case to that of an eviction of the tenant by title paramount; to which Lord NORTHINGTON has assimilated it as the ground-work of his opinion in *Brown* v. *Quilter*. The tenant can only be evicted where the title of the landlord was originally bad, where he never had in truth anything to demise, and the pretending to do so was a fraud upon a lessee. In the present case there was a full capacity to demise the thing leased, on any terms which the parties might agree upon. The possibility of destruction by fire was in their contemplation in

† See *Carter* v. *Cummings*, and *Harrison* v. *North*, 1 Cha. Ca. 83.

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making the lease; and it would have been very easy to provide against the payment of rent in such an event, or for apportioning the rent on a partial loss, if such had been the intention of the

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parties: on the contrary, the lessee has *expressly stipulated to pay the rent during the term at all events; and it is very difficult to say that that was not the intention. This therefore is materially different from the case of penalties relieved against in equity; the ground of that relief is that the actual payment of the penalty was not the intention of the parties, and the contract points out the real interests which are meant to be taken under it.† Accordingly, where, by the nature of the demand and of the penalty, it seems probable that the actual payment of the penalty was the intention of the parties, equity refuses to interfere, as in *Peterson* v. *Rolfe*,‡ and that class of cases.

Perhaps this case may be distinguished from that of *Brown* v. *Quilter*, so as not to clash with it. In *Brown* v. *Quilter*, the landlord had insured the house; by its being burned he became entitled to the insurance, and therefore had in his pocket the value of the thing which was the subject of his contract with the lessee. As to him therefore no loss had happened. There might be some equity to say that he should not keep the house, or its value, and receive the rent also, but should either put it down again for the use of the lessee, or remit the rent; this perhaps may make a distinction between that case and the present, so that a different decision may be adopted here, consistently with the facts of that case.—The two other cases decided, the one by Lord NOTTINGHAM, the other by Lord

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BATHURST, are mentioned *as being similar to that of *Brown* v. *Quilter*, and probably may in the same manner be distinguished from the present. And the question does not appear to have come directly before the Court in any of the other cases which have been mentioned. The dictum in *Weigal* v. *Waters*, although from an authority so highly respectable, is not such as to preclude further investigation upon the subject.

† See *Sir H. Peachy* v. *The Duke of Somerset*, 1 Stra. 453; *Sloman* v. *Walter*, 1 Bro. Rep. 419.

‡ 6 Bro. P. C. 470; see also *Hardy* v. *Marton*, 1 Bro. Rep. 419; and the notes in 1 Fonblanque's Treatise of Equity, 141, 387-8-9.

Then supposing the principle of equity contended for by the plaintiff to be clearly fixed, the defendant raises another objection to his claim, peculiar to the present case, from the conduct of the plaintiff himself in the manner of occupying the house. It is argued that a tenant, occasioning the loss of the house by his own misconduct, is not entitled to the general equity; and it is insisted that the plaintiff is culpable in converting the premises to an use by which the hazard of fire was increased; and in not proportioning his care to that additional hazard. It is certainly an important question, what shall be the effect of such a change in the use of a building where the lease has not specified any particular mode of enjoyment. There is also some contradiction in the evidence, with regard to the quantity of the increase of the hazard, and of the care taken to prevent its effects. It will be necessary for the Court to look into the case before we give our decision.

MACDONALD, Chief Baron, delivered the opinion of the Court:

Feb. 25.

Serjeants' Inn Hall.

In deciding this cause, it is material, in the first place, to ascertain how the rights of the parties stand *at law, before we proceed to consider the grounds of equitable interposition, upon which this Court is now called upon to vary those rights.

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By the deed which is produced, it appears that the plaintiff has bound himself for the payment of the rent by a positive covenant, and without any restriction. The exception in favour of the lessee, that he shall not be bound to repair in case of fire, is merely negative. It saves him from one of the duties to which he would otherwise have been liable in that event, under the general covenant, to repair: this does not necessarily excuse him in the same event from all the other duties to which he has made himself liable; and there does not seem to be any immediate connection between this saving and the covenant for payment of rent.

It is argued that the nature of the subject raises that connection. I take the distinction to be this: Where, upon a covenant by one party, the law raises another mutual and correlative covenant, the one becoming impossible, the other also is gone. But where the covenants both arise out of the express agreements of

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the parties, and are not described as dependent the one upon the other, although the performance of the one becomes impossible, yet the force of the other remains. And this has been repeatedly decided in cases resembling the present. In Dyer 33, a, and in *Paradine* v. *Jane*, Aleyn's Rep. 26, it is ruled that where a lessee covenants to repair, destruction by lightning, or the King's enemies, does not excuse. So, in the case at bar, the lessee would not only have been obliged to pay rent in the event that
[*697] has happened, but *to repair also, if that were not expressly excepted. In *Monk* v. *Cooper*, 2 Ld. Raymond, 1477, also reported, but less fully in 2 Stra. 763, where the covenant to repair was with the same exception as here, it was held that the lessee continued liable to payment of rent after destruction of the premises by fire. The same doctrine followed in *Belfour* v. *Weston*, 1 Term Rep. 310,† and in *Pindar* v. *Ainsley*, there cited by Mr. Justice BULLER, and again in *Doe* v. *Sandham*, 1 Term R. 705,‡ and Mr. Justice BULLER there observes, that the cases cited from courts of equity, in which a different rule prevailed, must have turned upon particular circumstances. These cases have clearly established the right of the landlord to recover at law on the covenant for rent.

In courts of equity the decisions have not been so uniform. In the case of *Harrison* v. *Lord North*, 1 Ch. Ca. 83, the CHANCELLOR seemed inclined to interpose in favour of a lessee, to prevent his being liable to payment of rent, where the premises had been taken from him by the King's enemies; but it does not appear that he in fact interposed in consequence of this opinion: And in *Carter* v. *Cummins*, cited ibid. the LORD CHANCELLOR refused to relieve the lessee from payment of rent, where the thing demised was carried away by a flood.

In the case in *Brown* v. *Quilter*, in Ambl. 619, Lord NORTHINGTON proceeds upon an opinion that, even at law, the right of the landlord to recover rent in a case like the present would be doubt-
[*698] ful; and he considers it as similar to the case of an *eviction; but there does not appear to be any analogy between the cases. Where the tenant is evicted upon a title contrary to that of his landlord, it is ascertained that the lessor demised what in truth

† 1 R. R. 210. ‡ *Ib.* 371.

did not belong to him. In that case he has no claim to have a continuance of the recompense for that which in fact was never his. Here, on the contrary, the question turns upon the effect of a covenant entered into by parties fully competent to contract concerning the subject of the demise, where the value of it is destroyed by a subsequent accident. Perhaps, however, the circumstance of the landlord having in that case recovered the value of the house against the insurers, may distinguish it from the present. The same circumstance also occurred in the case of *Camden* v. *Morton*. Of *Steele* v. *Wright* we know nothing more than what may be collected from the loose mention of it in argument in *Doe* v. *Sandham*. It is there considered as following the two decisions of Lord NORTHINGTON, and probably may have resembled those cases in this circumstance also. As to the dictum of Lord KENYON in *Doe* v. *Sandham*, it merely amounts to this, that if there is any remedy at all, it must be in equity; it negatives the remedy sought at law, but does not affirm the existence of an equitable claim.

In the present case there is not any one circumstance which was not in the contemplation of the law, when the rule, which still holds, was established; there is nothing to affect the conscience of the party. In *Brown* v. *Quilter*, the circumstance of having recovered the value from the insurers *might be considered [*699] as affecting the conscience of the lessor, so as to take that case out of the general rule; here the point comes before a court of equity with the same naked circumstances which have already been decided at law, and therefore the general rule must prevail, that equity follows the law.

By the misfortune which has happened, both these parties are damnified. The lessee is owner of the house during the lease, the lessor after its expiration; by the fire each loses his interest in it; what equity is there to throw the whole of the burden upon one of the parties, whose equity is certainly equal to that of the other?

The Court ground their decision, therefore, not upon any evidence of the particular circumstances of this case, or of the dangerous use to which the house was applied, but upon the general ground that the equity of the parties is equal, and the rule of law must prevail.

HARE v. GROVES.

The bill must be dismissed; but, as there are authorities which seem to warrant the plaintiff in coming here, let it be without costs.†

1796. *Feb.* 25.

Serjeants' Inn Hall.

[700]

FOLKINGHAM *v.* CROFT.

(3 Anstr. 700—701.)

On an agreement for a lease, "with all usual and reasonable covenants," a covenant not to underlease or assign is implied where the custom of the place is not generally against it.

THIS was a bill to have specific performance of an agreement for the lease of a public house at Leeds. The agreement was for a lease, "with all usual and reasonable covenants, commonly inserted in leases of the same nature." The plaintiff, the lessee, tendered a lease to be executed by the defendant. The defendant objected to the draught for not containing a covenant, on the part of the lessee, not to assign or underlease without licence. By the evidence it appeared, that there was no regular local practice upon the subject, it being equally common in such leases to insert or to omit the covenant in dispute.

Plumer and *Johnson*, for the plaintiff, relied on *Henderson* v. *Hay*, 3 Bro. R. 632.

Burton and *King*, on the other side, cited *Morgan* v. *Slaughter*, 1 Espinasse's Cases at *ni. pri.* where Lord KENYON ruled this to be an usual covenant.

The case having stood over for judgment from Michaelmas Term, the opinion of the Court was this day delivered by

MACDONALD, Chief Baron:

If this case came before us without any authorities, we should
[*701] not find *much difficulty in deciding upon it; the covenant in question is very old in the practice of the law, being recognized as well known in Lord Coke's time; and it is now so generally

† His Lordship also observed, that in the investigation of this case he had found much assistance from a note upon the subject by Mr. Fonblanque, in his Treatise of Equity. See 1 Anstr. 336.

adopted, that a lease made without such a covenant would be considered by everybody as improvidently drawn.

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A doubt is, however, introduced by the opposite decisions which have taken place upon the subject. In *Henderson* v. *Hay*, Lord THURLOW considers it necessary, by the terms of the agreement, that the covenant inserted should be incidental to the lease, that is to say, that it should be quite of course in such a lease; and his decision finds that this covenant is not incidental. The other case was decided by Lord KENYON, having that decision before him; and, therefore, although only a case at *nisi prius*, is entitled to great attention.

Upon the whole we are of opinion, that this covenant, being now so long established in common practice, may fairly be considered as a common and usual covenant to be inserted in leases: The bill must, therefore, be dismissed; but, as the opposite decisions upon the subject raised a case of fair doubt for the plaintiff to bring into court, he ought not to pay costs.

TARLETON AND OTHERS *v.* STANIFORTH AND OTHERS.

(In the King's Bench: 5 T. R. 695—701.)

TRINITY TERM. 1794. *July* 4.

TARLETON *v.* STANIFORTH.

IN ERROR.

(In the Exchequer Chamber: 1 Bos. & P. 471; 3 Anstr. 707—708.)

King's Bench. [5 T. R. 695]

In a policy of insurance against loss by fire from half a year to half a year, the assured agreed to pay the premium half yearly "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid; held that the insurers were not liable though the assured tendered the premium before the end of the fifteen days, but after the loss.*

THIS was an action of covenant. The declaration stated that by a deed poll, commonly called a Policy of Insurance, dated the

* It is stated that in consequence of this decision, the Sun and other offices gave public notice, that persons insured by policies taken out for one year or longer were considered as assured for fifteen days beyond the time of the expiration of their policies (Hughes, Porter on Insurance, p. 91; Phillips on Insurance, § 74 *n.*). A case in which

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10th of December, 1788, made by the defendants, three of the trustees or acting members of the society of the Liverpool Fire Office, to the plaintiffs, (which recited that the plaintiffs had paid 7*l.* 10*s.* to the Liverpool Fire Office, and had agreed to pay to them at their office 7*l.* 10*s.* on the 10th of June, 1789, and the like sum every six months during the continuance of that policy for insurance from loss by fire on goods, &c. not exceeding 6,000*l.*) it was declared that from the date of the policy, and as long as the plaintiffs should duly pay the sum of 7*l.* 10*s.* at the times and places aforesaid, and the trustees or acting members of the society should agree to accept the same, the fund of the society should be liable to pay to the plaintiffs such damage and loss as the plaintiffs should suffer by fire, not exceeding 6,000*l.* "according to the exact tenor of their printed proposals, dated January 1st, 1777." The declaration then averred, that in those printed proposals was contained this "Article 3rd, On bespeaking policies all persons are to deposit 9*s.* 6*d.* for the policy, stamp duty, and mark, and shall pay the premium to the next quarter day, and from thence for one year more at least, and shall as long as the managers agree to accept the same, make all future payment, annually at the said office, within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place until the premium be actually paid by the insured, his, her, or their agent or agents." It then stated that all payments due upon the policy were paid by the plaintiffs before the loss in question, according to the form and effect of the third article; that at the time of the printed proposals in 1777, and until the 16th of February, 1785, the society never insured for less time than a year, after which and until the making of this policy they insured for certain periods of time less than a year; that all insurances made by the society for less than a year have been made by certain deeds poll of like substance and effect with the deed poll above set

notwithstanding this advertisement, the insurance was held to have expired, is *Salvin* v. *James*, 6 East, 571. There are decisions somewhat similar to the above (in regard to life insurance) in *Ward* v. *Hunt*, 12 East, 183; *Simpson* v. *Accl. Insurance Co.*, 2 C. B. N. S. 257; 26 L. J. C. P. 289; *Pritchard* v. *Merchants Life Insurance Soc.*, 3 C. B. N. S. 622, 27 L. J. C. P. 169.—R. C.

forth, and referring in like manner to *printed proposals of the society, dated the 1st of January, 1777, and which said printed proposals, as to the said third article thereof, have during all the time last mentioned, remained and continued wholly unaltered; that divers payments of the premiums for insurances for periods of time less than a year have been made to and received by the society within fifteen days after the several days limited by the respective policies containing such insurances, without any objection on the part of the society, and such policies have thereupon continued and remained in force. It then stated a loss of the plaintiffs' goods by fire, to the amount of 6,000*l.* after the making of the said deed poll and whilst the same remained in full force; to wit, on the 11th of December, 1789, and before the expiration of fifteen days after the day limited by the policy in that behalf, and before any disagreement or refusal of the trustees or acting managers of the society to accept the sum of 7*l.* 10*s.* every six months according to the effect of the policy, or to continue the policy; notice to the defendants, &c. and non-payment by them, &c. In the second count it was averred that the true intent and meaning of the policy was, that the plaintiffs should be insured against any loss happening within fifteen days after the particular days of payment, unless before the loss the society should have refused to renew the policy, or unless the plaintiffs should have omitted to tender the sum due after those fifteen days. It then stated that all payments, (except that of 7*l.* 10*s.* after mentioned,) which had ever become payable by virtue of the policy and of the printed proposals, were before the loss made by the plaintiffs to the society at their office, &c. and that afterwards, and before the expiration of fifteen days from the 10th of December, 1789, being the day limited by the policy, to wit, on the 11th of December, 1789, the plaintiffs tendered to the society at their office the sum of 7*l.* 10*s.* the managers of the society not having then or before in any manner disagreed or refused to accept the same according to the form and effect of the third article of the printed proposals, and then and there requested the managers to accept the same, &c. The third count varied from the second in this respect, that, instead of setting forth the third article of the printed proposals verbatim, it stated

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the effect of it thus: "that so long as the managers shall agree to accept of the same, all payments shall be made at the said office of the society within fifteen days after the day limited by the respective *policies for payment thereof upon forfeiture of the benefit thereof," &c.

[*697]

The defendants pleaded to the first count, *inter alia*, that the loss did not happen until after the 10th of December, 1789, and that although the plaintiffs paid to the society the sum of 7*l.* 10*s.* which by the policy was made payable on the 10th of June, 1789, they did not pay the like sum of 7*l.* 10*s.* on or before the 10th of December, 1789, which they ought to have done in order to have continued the policy up to the time when the loss happened, &c. They pleaded to the second count that the sum of 7*l.* 10*s.* was not tendered to the managers until after the 10th of December, 1789, who then refused to accept it, &c.; and a similar plea (among others) to the third count.

To these three pleas the plaintiffs demurred generally.

Chambre, in support of the demurrers, after stating the question to be, Whether or not the protection, to which the persons who insure for a year are entitled under the annual policies and the printed proposals to which they refer, is not also extended to those who insure for a shorter period than a year? argued in the affirmative. Though the words "payments annually" are used in the printed proposals, it was the obvious intention of the society to extend all the terms in those proposals to policies for less than a year when they first begun to insure for short periods. In the construction of covenants the words are to be taken most strongly against the covenantor, and the plain and manifest intention of the parties must prevail rather than the strict letter, if that letter be against the intention. *Teat's* case, Cro. Eliz. 7; and *Griffith* v. *Goodhand*, Sir T. Raym. 464. It is more particularly necessary that these kind of covenants should be construed according to the intention of the parties, because all policies of insurance against fire, as well as marine insurances, are drawn inaccurately; and in fact they have always received the most liberal construction. The policy in question refers in express terms to the printed proposals in

1777, and must be considered as adopting and incorporating them in every instance to which they can in the nature of the case be applied; and if it had been intended that there should be any alteration in the duration of the term, it should have been made in express terms. Then as the fifteen days are allowed on annual insurances, it was equally intended that the same allowance should be made on insurances for a shorter term. It is not necessary to contend that *the insurance continues in [*698] force for fifteen days beyond the year or half year at all events: but during that time the parties have an option either to continue the insurance or not as they please: but "until they disagree" they must be taken to agree to the continuance of it; the words are "as long as the managers agree to accept the same," which evidently mean "unless they express their dissent," &c.; and here it is averred that the managers did not disagree before the loss happened. If a lease be made for a year, and so from year to year as long as both parties please, it continues in force until some act be done by one party to determine it; and if the lessee hold over a day after the expiration of the first year without any objection on the part of the landlord, the latter is considered as agreeing for another year. And though the trustees in this case refused after the loss to accept the premium for the next half year, they had then no right to disagree to the continuance of the policy. If it be objected that it would be unreasonable to apply the same indulgence to policies for half a year that is given to those for a longer period, it is to be observed that whether the policy be for a long or a short time, the fifteen days can only be reckoned once; for when the renewal is made, it relates back to the last day of the last term exclusive of the fifteen days.

Heywood, Serjt. *contrà*:

First, the policy in question, being only for half a year, has no reference to the third article in the printed proposals, which is applicable only to cases where the payment is to be made annually. The policy only refers to those proposals which can be applied to it: but it seems absurd to say that when the contract was to pay a premium half yearly it shall relate to an article which treats only of annual payments. But, 2ndly, even

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if the third article were incorporated into this policy, the plaintiffs are not entitled to recover, because there was no contract in existence between the parties at the time when the loss happened; for the policy expired on the 10th of December, and the loss did not happen until the day following. It has been contended, however, that though the policy was not absolutely and in all events to continue in force for fifteen days beyond the half year, it must be understood that both parties meant to be bound for that time, unless one or the other expressed his disagreement to the continuance before any loss happened in the interim: but that is by no means the fair construction of this agreement; it is a contract only for half a year, and if both parties choose to

[*699] *agree within fifteen days after to continue it for another half year, they must expressly agree to do so, the one by paying, the other by accepting, the premium; and when they do thus agree, the insurance takes effect from the first day by relation; the object of this indulgence being merely to save the expense of a new stamp for a policy. But unless both the contracting parties do agree within the fifteen days to continue the policy, it is absolutely at an end at the expiration of the half year; for the acceptance of every premium makes a new contract; and here before a new contract was entered into, the loss had happened, and that at a time when the old contract was expired. The third article too, if it be considered as incorporated into such a policy as the present, shews that the insurers did not intend to bind themselves beyond the half year, unless they did some further act to evince their agreement to the continuance of the contract; for by that article it is expressly stipulated that "no insurance is to take place until the premium be actually paid by the insured."

LORD KENYON, Ch. J.:

To the general positions of the plaintiff's counsel I perfectly accede. I admit that this kind of insurance is as much to be favoured as marine insurances; that in the construction of deeds the obvious intention of the parties is to prevail; and that the words of the covenantor, according to Lord Bacon, *fortius accipiuntur contrà proferentem.* But these principles do not lead to

the conclusion attempted to be deduced from them, that therefore the plaintiffs are entitled to our judgment. It was admitted in the argument by the counsel for the plaintiffs that the insurance, when made, did not extend to half a year and fifteen days; and that completely puts an end to the whole case. By the agreement under which the plaintiffs were insured they stipulated that they would pay half yearly, namely, on the 10th of June and the 10th of December, the sum of 7*l.* 10*s.* and that they would, as long as the managers agreed to accept the same, make their payments within fifteen days after the day limited. If therefore, when the first premium was paid, the insurance did not extend to fifteen days beyond the half year, the continuation or prolongation of the term depends on two circumstances which must both concur, that the assured should pay the sum of 7*l.* 10*s.*, and that the insurers should agree to accept that sum. Here, after the policy had had its effect, and before the expiration of the fifteen days, during which time the assured might have proposed to continue the policy, and to which proposal the trustees might or might not have acceded, *the loss happened. [*700] Barely stating these facts is sufficient to shew that the plaintiffs are not entitled to recover. They insist that though the time of insurance was expired, and though no new insurance had been made, they are protected by the policy by reason of the indulgence for fifteen days: but that argument cannot be supported; the allowance of the fifteen days was merely given for the purpose of saving the expense of a new policy and a new stamp. The plaintiffs were right in contending that policies for half a year referred to, and adopted, the printed proposals: but the third article in those proposals is decisive against the plaintiffs; for it says that the premium must be paid "as long as the managers agree to accept the same" within fifteen days after the day limited; and that no insurance is to take place until the premium be actually paid. Then in express terms no policy is to have existence until the premium be paid by one party and accepted by the other. In this case the loss unfortunately happened in that interval of time, when it was in suspense whether or not the policy would be renewed; for at that moment the plaintiffs had not offered to pay, and of course the trustees had

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not accepted, the premium for the next half year. I am therefore clearly of opinion that the defendants are not liable.

ASHHURST, J.:

Strictly speaking, the policy ought to have been renewed on the day when the former half year expired. Were it not for the allowance of the fifteen days, a new policy on new stamps must be made every half year; but to guard against any inconvenience arising from the negligence of the assured, a period of fifteen days is allowed to them, provided the premium be tendered by them and accepted by the trustees. But the assured are at their own risk during this interval; for if any accident happen before the premium is actually paid, they stand uninsured. It appears to me, both from the words of the printed proposals and the intention of the parties, that the defendants are not liable in this case, because the parties had not agreed for the next half year when the loss happened. There would be great injustice in putting any other construction on this policy; for then the assured would have the interval to consider whether or not he would insure for the next half year; if no loss happened during the fifteen days perhaps he would not insure; but in the event of a loss during that period he would insure after it happened. But in order to make the defendants liable as on a contract, both the contracting parties
[*701] must be bound; whereas according to the *plaintiffs' construction, only the defendants would be bound for the fifteen days.

GROSE, J.:

I am perfectly satisfied that the construction put upon the policy, and the printed proposals to which it refers, is the true one. The insertion of the third article, that the premium should be paid "as long as the managers agreed to accept the same," within fifteen days after the day limited, seems to have been introduced for the purpose of guarding against this very case; a loss happening in the interval between the expiration of the former agreement and the time of the parties agreeing for a further term. Under this agreement the trustees cannot be compelled to insure after the loss has happened, the plaintiffs not having before determined to renew the policy.

The third article gives the trustees the option of accepting or refusing the premium; and adds, in express terms, that the insurance is not to take place until the premium is actually paid.

LAWRENCE, J.:

The defendants are not answerable in this case, because the policy was not in force at the time when the loss happened. One object of the insurers was to have the policy continued; and to induce the assured to pay the premium at an early period within the fifteen days, they were to be at their own risk between the time when the former insurance expired and the beginning of the new insurance.

Judgment for the defendants.

(SAME CASE.—IN ERROR.)

EASTER TERM. 1796. *April* 20.

Exchequer Chamber.

[3 Anstr. 707]

Chambre, for the plaintiffs in error, in addition to the arguments used below, contended that the general intent of the parties clearly was to give fifteen days for renewal, after the expiration of the period insured; that during these fifteen days both parties have a right of dissent; but if no disagreement is expressed, the payment within the fifteen days relates back so as to cover that part of the time already elapsed. If a contrary *construction is adopted, the mentioning fifteen days at all is only an artifice to deceive the insured into an opinion of their being safe, when in truth they are not. If it is a new agreement, without any other connexion with the former except that of being on similar terms, the parties may come to such an agreement at any time. The fifteen days given must mean some benefit which they cannot have afterwards; which they "forfeit," if the premium is not then paid.

[*708]

BULLER, J.:

The clause is meant for the purpose of making it a continuance of the old agreement, so as to avoid the expense of new stamps.

Chambre:

If the insuring office receives, on the 15th day after the expiration of the former year, the premium for a year's insurance, to

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commence from the expiration of the former year, they receive a whole year's insurance for a period less than a year by those fifteen days; for the insured has already stood the hazard during that time: this supposes a constant imposition on the one side and mistake on the other. In all mercantile transactions, the meaning of the parties is explained by the course of the trade.

Wood on the other side.

The COURT were clearly of opinion that the

Judgment ought to be affirmed.

EASTER TERM. 1796. *April* 22.

[709]

MUTLOE *v.* SMITH.

(3 Anstr. 709—710.)

A defendant in ejectment is not compellable to discover his own title so far as not affecting the title of the plaintiff.*

THE bill stated that A. B. died above twenty years ago, seized in fee of a messuage, leaving the plaintiff his heir at law. The widow continued in possession of the premises till her death in 1789, and her daughter the defendant has continued in possession ever since. The bill suggested that the defendant claimed under some deed or devise from the ancestor of the plaintiff, and prayed a discovery of her title.

The defendant demurred.

Romilly for the demurrer insisted, that a court of equity never compels a tenant in possession to make a discovery, unless to remove any obstacles out of the plaintiff's way in proving his own title, as if the defendant has his deeds, &c. *Buden* v. *Dore*, 2 Ves. 445. *Ivy* v. *Kekewick*, 2 Ves. jun. 679,† and a similar case of *Davies* v. *Henley*, 1st November, 1793. After so long possession and a descent cast, the origin of the defendant's title is not to be inquired into.

* It is otherwise as to matter relating to the defendant's cause of possession, tending to set up the plaintiff's title. *Lyell* v. *Kennedy* (H. L. 1883) 8 App. Ca. 217, 52 L. J. Ch. 385, where the authorities are very fully investigated.—R. C.

† 3 R. R. 30.

Partridge and *Lewis*, for the plaintiff, insisted that there was that privity between the parties, which entitled them to a discovery. The bill states that the defendant claims by a devise, or otherwise, under our ancestor; we have a right to know how we are disinherited. The length of time cannot be set up, because the widow had a *right to her dower in the house, and her possession cannot be considered as adverse. MUTLOE v. SMITH. [*710]

The demurrer was allowed.

EXCH. SITTINGS AFTER TRINITY TERM.

ARCHDEACON AND OTHERS *v.* BOWES AND OTHERS.

(3 Anstr. 752—753.)

1796. *June* 30.

An incumbrancer who is in possession, not in that character but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver.† [752]

A SECOND mortgagee, plaintiff, applied for a receiver. This was objected to by one of the defendants, who had purchased from the plaintiff a part of his mortgage, and who was in possession, as tenant, of a part of the estate, the rent of which was equal *to the interest he was entitled to receive upon the mortgage. [*753]

Romilly and *Hull* argued, that the appointing a receiver of this part of the estate could have no other effect except to increase the expense, as the defendant must receive back as interest what he is to pay into Court as rent. One tenant in common cannot move to have a receiver appointed against another, unless where the latter takes more than his share of the profits. *Street* v. *Anderton*, 4 Bro. R. 414.

The COURT thought that the defendant could not unite his two characters of mortgagee and tenant; and that his possession, being as tenant, could not be set up against the other mortgagee.

The order for a receiver was granted.

† Fisher on Mortgages, § 731.—R. C.

1796.
June 30.

[755]

CORBETT *v.* BARKER.

(3 Anstr. 755—759.)

Baron and feme seized in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption, by lease and release, to the mortgagee; the mortgagee remains in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy, from whom he had his conveyance: the heir of the wife is not barred of his equity of redemption by lapse of time.

THIS case came on for re-hearing at the sittings after Trinity Term, 1795.

Burton and *Scafe*, for the plaintiff, insisted, that upon the circumstances of the case the mortgagee was not entitled to set up the length of possession to bar the redemption. The mortgagee bought the equity of redemption of the father and mother of the plaintiff, and entered into possession of the premises, upon that purchase, as absolute owner; he did not therefore consider himself to hold as mortgagee, but to have all the interest of the mortgagor, and his possession was therefore as standing in the place of the mortgagor; as such he committed waste by cutting down timber, &c. which as mortgagee he could not have done; † his answer insists upon that title, then his possession is no bar, but a confirmation of the estate of the plaintiff, who claimed as heir of the mother, after the tenancy by the curtesy to which the defendant was entitled. The defendant had two characters in him: he is bound to discharge the duties of each. As mortgagor he was bound to keep down the interest out of the rents; or, if

[*736] he could be considered *as holding as mortgagee, then he was bound as mortgagor to settle accounts regularly with the mortgagee, and to prevent the equity of redemption from being barred by his laches. If he is considered as having performed those duties, he protects the right of the plaintiff as well as his own interest as mortgagor. When the two rights concur, it is im-

† When the legal estate in land, and a legal charge upon it vest in the same person, for a time, he is considered as in of the principal estate, and the charge is suspended for the time that the rights are united. In equity the estate of the mortgagor is considered as the principal, that of a mortgagee as a charge upon it; perhaps the latter ought to be considered as merging in the former while they are in one person.

material which was first in the person holding both. Suppose the tenant for life of the equity of redemption had bought up the interest of the mortgagee, he might equally insist, by 20 years possession, to bar all remainders; the dangerous tendency of such a rule is apparent. The utmost that can be argued is, that his possession is to be referred to both his rights; he will then be considered as in possession as mortgagee to the extent of the interest of his mortgage, and to have received the surplus profits as mortgagor. But time does not begin to run against the mortgagor, where by accounts, by paying over to him the surplus profits, or in any other way, his title is recognized and kept alive. While by any of those means the title of the tenant for life is preserved, the remainderman is in no danger, and there is no necessity for him to redeem in order to save his right. Remaindermen have been allowed to redeem upon the ground that they would otherwise be damnified by the laches of the tenant for life, in not redeeming or getting regular accounts; but the defendant cannot set up his own laches as tenant for life, so as to put us under the necessity of protecting ourselves from the consequences of his misconduct. The time prescribed for redemption in equity is taken from analogy to the statute of limitations at law, which runs from the time when the right of entry accrued. During *the continuance of the life estate we had no right of entry, nor [*757] any thing in the nature of it; we had no right to call for an account, for the defendant was entitled, in his different characters, to the whole profits. The principal reason of refusing a redemption after 20 years is, to avoid long and intricate accounts; here there can be no account till the death of the tenant for life.

Romilly, on the other side:

It is clear that a remainderman may redeem during the life of the tenant for life, and that if he does not the time runs against him. *Hayes* v. *Hayes*, 1 Cha. Ca. 223; *Cornish* v. *Mew*, Ibid. 271; *Clyatt* v. *Batteson*, 1 Vern. 404; *James* v. *Hales*, 2 Vern. 267; *Ballet* v. *Sprainger*, Prec. in Ch. 62. And a tenant by the curtesy is considered for this purpose in the same light with any other tenant for life. *Casborne* v. *Inglis*, 1 Atk. 606, 7 Vin. Abr. 156. If the tenant for life will not join in redeeming, the re-

CORBETT v. BARKER.

mainderman may alone redeem and then foreclose him; if neither redeems, the Court interferes to prevent the mortgagee from being disturbed after 20 years. When the time has once begun to run, it is immaterial to him who are the parties entitled, or how the interest is divided, nor is a tenancy by the curtesy any bar to it. *Anon.* 2 Atk. 333.

If it were necessary to decide the question, to what title the possession should be referred, it seems rather that it ought to be referred to the legal right under which he was entitled to the possession, than to the other, under which he could have no possession but by sufferance.

[758] But if the argument of the plaintiffs be right, that the possession is not referable to the title as mortgagee, the case is still more against them. The equitable limitation of suits to redeem, is for the purpose of quieting titles, where the conduct of both parties amounts to a dereliction of the right to redeem. If the mortgagee does not pretend to hold in any other capacity, but admits the right of the mortgagor by accounting or otherwise, the time does not run; here the defendant took a conveyance, purporting it to be absolute; under that he has held as complete owner, committing waste, and doing other things inconsistent with his character, either of mortgagee or of tenant for life of the equity of redemption. If the mortgagor looks on and permits the mortgagee to exercise acts of complete ownership for 20 years, it is a dereliction; after that period the nature of the estate in the hands of the mortgagee changes; it becomes real instead of personal estate, descending to the heir instead of the executor; their rights and the rights of creditors are fixed at that period.

THOMSON, Baron:

Suppose after 20 years, and after the rights of the heir or of creditors are fixed by the death of the mortgagee, a foreclosure were upon all the circumstances allowed, to whom do you suppose that the mortgage money would go?

Romilly:

My argument supposes that that question can never arise. I

consider the being irredeemable and being real assets, as concurrent. If the Court decrees a redemption, I apprehend they decree that the estate never became real property in the hands of the mortgagee.

It is not true that the reason of the rule is to avoid intricate accounts if the mortgagee in possession were to admit that he had been overpaid his mortgage, yet the Court would not decree redemption after twenty years. It is a positive rule, introduced by analogy to the statute of limitations at law, to compel regularity and diligence in the prosecution of every claim. The argument that the defendant was bound to account to himself as mortgagor, applies to every case; a mortgagee in possession is always bound to render an account of the rents and profits, and what he receives above his interest is received for the mortgagor, provided proper diligence is used to call for that account by applying to a court of equity to redeem. [759]

MACDONALD, Chief Baron, this day delivered the opinion of the Court:

By attending to the different rights of the defendant it appears, that he stood in the place of the tenant by the curtesy of the equity of redemption; for he claims to hold under him by the last conveyance, and immediately upon taking it he entered into possession; in that character it was his duty to keep down the interest of the mortgage; as mortgagee he was to receive the interest; uniting these two characters he is to be considered as having supported the different rights and discharged the duties of each. In the general case, a presumption arises from no payment of the surplus rents being made, nor account delivered for so long a period of time as twenty years: here the presumption cannot arise, because it was the same person to pay and to receive; the case does not therefore fall within the general rule.

The decree was reversed, and redemption directed.

1796.
June 30.

[769]

SIR WATKIN LEWIS AND OTHERS *v.* MORGAN AND OTHERS.

(3 Anstr. 769—777.)

The relation of attorney and client, together with apparent irregularity, is sufficient ground for opening up a stated and settled account.†

SIR WATKIN LEWIS, being seized in fee of certain estates, subject to a mortgage for 5,000*l.* to Dr. Kent; and being also possessed for life of other estates, with the reversion in Lady Lewis in tail; and being desirous, with the consent of Lady Lewis, to raise a further sum on the security of those estates, in 1773 employed the defendant John Morgan, as his attorney and agent, as well for the purpose of transacting the said loan and security, as generally in all his law and money concerns. In March, 1775, Sir Watkin and Lady Lewis settled the estates (by several fines and recoveries) to the use of Sir W. L. for life, remainder to Lady L. for life, remainder to their issue in tail, but subject to a term of 500 years in the estates before belonging to Lady L. created by the said settlement, and vested in George Morgan and James Morgan, the brothers of the defendant John Morgan, in trust, to raise by sale or mortgage the sum of 12,000*l.* and thereout, in the first place, to pay and discharge the said mortgage of 5,000*l.* to Dr. Kent, and to pay the residue to Sir W. L.

On 2nd June, 1775, the trustees mortgaged the trust premises to Farrer for 6,610*l.* being money in his hands in trust for the defendant John Morgan for life, remainder to his wife, &c. according to their marriage settlement; of this sum of 6,610*l.* for which the mortgage was given, 2,400*l.* was a bond, the con-

[*770] sideration of which was not explained, due from Sir *W. L. to Chardin Morgan, (another brother of the defendant,) and assigned by him to Farrer as such trustee; the remainder was not paid in discharge of Dr. Kent's mortgage, nor to Sir W. L. but to the defendant John Morgan, who kept it with his other cash at his banker's. On the 2nd and 3rd April, 1776, the

† The points at later stages of the case are reported in 4 Dow. 29, and 5 Price, 42.—R. C.

farther sum of 1,390*l.* was raised by another mortgage to Farrer, as trustee in J. Morgan's marriage settlement, and 4,000*l.* by mortgage to one Wilde. Soon after this last transaction, the mortgage to Kent was paid off; the remainder of the money was paid into the hands of Mr. John Morgan, as agent and banker for Sir W. L. Sir W. L. had frequently settled accounts with Mr. John Morgan; the last balance was struck in 1777, and a note given by Sir W. L. for the balance admitted to be due from him, and all the vouchers which had been produced at the time of settling the account were delivered up to Sir W. L. In these accounts were contained several bills of costs, which were not taxed, nor disputed except in one very trifling item. Soon after these transactions, the defendant John Farrer, as mortgagee, (in trust for Morgan's marriage settlement,) demised the whole premises mortgaged to the defendant John Morgan, for sixty-one years, if he should so long live, in trust to pay the interest of the mortgage, and then to retain to himself a salary of 40*l.* a year for his trouble; Sir W. Lewis was prevailed upon to join in securing this salary, which was afterwards advanced to 60*l.* In 1778, the defendant Mr. John Morgan entered up judgment on a warrant of attorney, obtained from Sir W. Lewis, for the above balance and other debts, and took out an extent against his other estates. The bill *was filed in 1783, and prayed to open [*771] the whole accounts. The defendant insisted on the accounts settled, as a bar to that part of the demand.

[After arguments:]

MACDONALD, Chief Baron, stated the case, and observed that [773] the real nature of the transactions between the parties, might be gathered from the result of their connexion.—Sir W. L. possessed of a very considerable property, mortgaged, originally, only for 5,000*l.* is led to give up the whole management of it to the defendant, for the purpose of clearing himself of his difficulties; and he now finds his estate incumbered to more than three times the original amount; himself having received comparatively *no benefit either from the rents during all that [*774] period, or from the sums for which the estate is now pledged.—As to all the transactions since the last account settled between the

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parties, there is no doubt that Mr. Morgan must account. But it is contended that the account ought not to be carried further.

It is to be observed that we are here in the case of an attorney dealing with his client. An attorney has often been stated to be an officer of the Court, bound to protect his client against all acts which may be detrimental to his interest; bound to apprize him of the consequences of his actions, and to have a ready account of the circumstances belonging to them, that he may be able to lay a regular statement before the Court, when called upon. Accordingly Lord HARDWICKE observes in *Wilmsley* v. *Booth*,† that the case of an attorney and client is stronger than any of the cases of influence or coercion which he had before enumerated; and that therefore even payment of the bill and a receipt given, or a mortgage, or other security obtained for the payment, shall not prevent the bill being taxed; accordingly, in his reconsidered opinion, he proceeds on these public grounds, to set aside the bond there obtained. In *Newman* v. *Payne*,‡ before the present Lord Chancellor, the same language was held, and a similar decision pronounced upon the general principles of justice, arising from the relations between the parties.

From the principles acted on in these cases, from the character of an attorney, as an officer of the Court, having a share in the
[*775] administration of its *justice, in whom the client must not only from choice but from necessity place confidence; the Court will require an account of the conduct of that officer, where they see any grounds of suspicion. An attorney is accountable to the Court, as well as to the party.

The objections made to entering into an account of these transactions are as follow:

1. That no specific errors in the accounts have been alleged and proved.

2. That they are settled accounts.

3. That the vouchers have been delivered up.

4. The length of time.

As to the awards it will be unnecessary to consider them. They can have no other avail except to shew that the charges of one attorney were exorbitant in the opinion of another.

† 2 Atk. 23. ‡ 2 Ves. jun. 199.

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As to the first objection, it must be admitted that, so far as relates to errors charged in the bill, the plaintiff's case is by no means a strong one; but on comparing the schedules and the answer, the accounts turn out to be without any sort of accuracy, without dates, and so confused and perplexed, as materially to vary the balance; with such irregularity and obscurity throughout, as to baffle the attempts of ingenious argument, and to render the answer and schedules taken together completely unintelligible. Upon the last account a balance of 567*l.* was secured by note to Mr. John Morgan. This is open to the observation before made. The account was settled in such a manner as no attorney *of reputation would have suffered his [*776] client to settle and allow any account, much less such an account. This answers the second objection.

The third objection is, that the vouchers have been delivered up. Where the Court objects to the accounts themselves upon the face of them, there is the same reason to doubt of the sufficiency of the vouchers verifying those accounts: From the unbounded influence of the attorney over the client, arising from design on the one hand and facility on the other, the sufficiency of the vouchers cannot but be questioned. The danger of calling to account a party disarmed of his vouchers, is certainly to be considered as very serious; it is, however, to be presumed that an attorney keeps a regular account, to which great weight must be given, and the other party must either produce the vouchers given up, or give an account of them. The plaintiff's counsel consent that the vouchers shall be returned, and that the plaintiff must be satisfied with the oath of the defendant, as to the import of those vouchers which were delivered up, and which the plaintiff is not capable now to produce. In *Vaughan* v. *Lloyd*,† that was not held a fatal objection. There it was supplied, and so it may here, by permitting the party's oath to supply the place of the vouchers.

With respect to the particular situation of the plaintiff, as a barrister, magistrate, &c. that has no weight against the clear fact of his having delivered *himself over to Mr. Morgan, as his [*777] sole legal adviser and confidential attorney.

The last objection arises from the length of time. The last

† Before Lord Thurlow, 1781.

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settlement of accounts was in 1777. The bill was filed in 1783. On this part of the case we have before us the authority of Lord HARDWICKE in the case of the *Drapers' Company* v. *Davies*,† a case very similar to the present, for opening the accounts, where an attorney had improperly obtained securities from his client seventeen years before, for bills which upon the face of them contained improper items.

Upon the circumstances therefore of the complicated and confidential relation in which these parties stood, and the unsatisfactory accounts contained in the bills delivered, and the whole transactions, we are of opinion that the dealings between these parties, Sir W. L. and Mr. J. Morgan, ought to be examined, and the account gone into; the plaintiff to produce all vouchers delivered up to him, and still in his possession; and where a voucher is not to be found, and is sworn to, that it shall be considered as an established fact that such voucher did exist.

EXCH. MICHAELMAS TERM.

POTTS *v.* DURANT AND OTHERS.

1796. *Nov.* 16.

(3 Anstr. 789—795.)

[789]

An instrument purporting to be an endowment, without the seal, and another purporting to be an inspeximus thereof under the seal of the Bishop, were rejected as coming out of private hands unconnected with the matter in dispute.

THE plaintiff claimed tithes as vicar of Flixton in Suffolk. He offered as evidence of his right, an instrument without a seal remaining, which purported to be an endowment, dated 1321, and another dated 1412, having a seal annexed, purporting to be an inspeximus under the seal of the Bishop of Norwich, and containing a copy of the former, which is stated to be then in the registry of the diocese. These two papers belonged to and were produced by Mr. Astle, (the keeper of the records in the Tower, and himself a considerable collector of ancient MSS.)

† 2 Atk. 295.

who had purchased them at the sale of the effects of the late Mr. Martin, an eminent collector.†

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He also produced a record in the Archdeacon's registry of that diocese, of the induction of a vicar in 1321 (a few months after the endowment) to the vicarage "*de novo ordinatam.*"— The Augmentation-office and Bishop's registry had been searched, but no endowment or copy of it could be found. The rectory belonged to the nunnery of Flixton, which was dissolved by 27 H. VIII.

[790]

Burton, *Partridge*, and *Alexander*, for the defendants, objected that this evidence was not admissible. An endowment is like a terrier, an ecclesiastical muniment, which ought by law to be kept in the registry of the diocese, and has its authenticity from being found in that repository. The copy kept by the nunnery ought to be in the Augmentation-office. Unless the instrument comes from one of these offices, *it is not entitled to be received as an endowment. *Atkins* v. *Hatton* (2 Anstr. 387 ‡); *Miller* v. *Foster* (*ibid. n.*§). So in the case of *Shandeaus peerage*, the House of Lords rejected a piece of evidence coming from the Ashmolean Museum. The production of the copy, verified under the seal of the ordinary, throws a suspicion on both. The only motive for taking such a copy,

[*791]

† Mr. Martin obtained this and many other MSS. through his wife, who was widow of Mr. Leneve, the keeper of the records of the Chapter House, Westminster, in which many of the writings of the smaller monasteries are deposited; hence it was suggested that they had originally come from that repository. These circumstances were stated by Mr. Astle to the Court, on his being examined to prove the exhibits. After the decision of the Court, rejecting the evidence, the counsel for the defendants pressed to have leave to exhibit interrogatories to prove the facts, and also to prove the seal to be the Bishop's, and the deeds to be in the mode of writing used in the time they bore date, that these facts might appear on the record for the purpose of a rehearing or appeal. They insisted on the probability of Mr. Leneve having taken out these MSS. from the registry and forgotten to restore them, or died before having an opportunity to do so: that this testimony had been before the Court, and considered as facts in the cause, though not on the record, and that they ought therefore to be put in such a form as to have the same weight on rehearing or appeal.—The Court thought the application to add to the record after the decree irregular, and it was refused accordingly.

‡ 3 R. R. 589.

§ *Ib.* 590, *n.*

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to be kept with the original, must have been that the original was defaced or worn out by length of time.

Graham, *Plumer*, and *Fonblanque*, on the other side:

The general inclination of the Courts in modern times has been to consider objections to testimony as applying to the credit rather than the admissibility of the evidence.† In this case the credit of the instruments is unimpeachable. It is proved by the induction of the vicar 1321, that there was an endowment then lately made, which is not found in any of the proper repositories. It is proved that this is of the hand-writing of that time; and it is impossible to shew an interest, either at that time or afterwards, by those persons from whom Mr. Astle purchased, to fabricate a forgery.

Even a terrier may, by the determination of the Court of King's Bench in *Miller* v. *Foster* (2 Anstr. 388, *n.*‡) be received in evidence, although coming out of private custody. But the custody of a terrier is more nearly of the essence of the instru-
[*792] ment; *it becomes a terrier by being returned to the Bishop. An endowment is like any other grant. The custody is immaterial, unless as a circumstance affecting the credit of the evidence produced. The most suspicious of all custody is that of the party interested in the contents, yet all deeds and charters relating to private concerns are in that custody. The register of the diocese is the repository of ecclesiastical endowments, and other deeds, as the private charter-chest of an individual is expected to hold the muniments of his estate. Yet evidence adduced from other quarters may be good.

It is not true that the registry of each diocese contains all the muniments which properly ought to be lodged there; many are extremely defective, none perfect. There being no endowment of this vicarage found there, while it is clear one did exist, proves a deficiency in this case. The Augmentation-office is still more imperfect. On the dissolution of the monasteries, few of them had any desire to preserve their muniments for the use of their plunderers. Many carried them to Rome, others suffered them

† *Walton* v. *Shelley*, 1 T. R. 300; *R.* v. *Bray*, Rep. temp. Hard. 358.

‡ 3 R. R. 590, *n.*

to be dispersed in private hands; many of which have been saved and collected by the curiosity of individuals. If a man has lost a deed for any space of time, does it lose its authenticity by ever having been in the casual possession of a stranger? It must even be argued that a document which has ever been suffered to go out of the public custody, although afterwards restored, has for ever lost its claim to be admitted as evidence. In this case, the endowment coming into private hands is accounted for either from the history of the dissolution of the monasteries, or by *supposing it to have been taken out of the registry by Mr. Leneve. [*793]

Supposing the original endowment not to be admissible, as not having a seal nor the authenticity derived from public custody, that will let in the inspeximus as evidence. It is a copy, and the original lost. The seal proves itself independent of all other circumstances.† Even a new grant from a corporation is so proved.—The production of the first without a seal, which is the essence of a deed, explains the necessity of the convent obtaining from the Bishop this confirmation of its existence.

The case of the *Shandeaus peerage* turned upon the nature of the paper produced; it was a pedigree made out by a stranger, who did not appear to *have had any access to know the correct history of the family, and not recognized as authentic by being placed among their muniments. [*794]

The case stood over for the opinion of the Court on this point.

MACDONALD, Chief Baron: Nov. 11.

This cause has stood over for the Court to deliberate on the

† The following note was found in the hand-writing of Mr. Martin, out of whose possession the endowment was purchased by Mr. Astle:—

"The Honourable James West, Esq., Member of Parliament for St. Alban's, has the original deed, in which the Abbot and Convent of St. Edmund's Bury convey to St. Saviour's Hospital in Bury, two portions of tithes of the demesne of Herringwell in Suffolk. This deed was produced before the four Barons of the Exchequer on hearing the cause between Burton, clerk, and Holden, Esq., concerning the tithes of Herringwell Farm, in 1756."

Upon referring to the minutes in the Exchequer Chamber book, 26th February, 1756, it appears that a deed corresponding to the above description was read in evidence.

Mr. West was a great antiquary and collector of curious MSS.

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admissibility of the two instruments produced by the plaintiff. The objection is that they come out of the hands of a private person, instead of that repository which the law has allotted to such instruments. It was attempted to trace them from that repository, but we do not see sufficient probable testimony of that fact, and can only consider them as coming out of private custody. The present possessor bought them out of another private collection: we can trace them no further.

As the distinctions upon this subject are not very clearly defined, we have consulted with others of the Judges how far the Courts ought to go in admitting such testimony; and we are satisfied that this is an attempt to go further than the Courts ever have gone or ought to go. The instruments come out of the custody of a private person, perfectly unconnected with the matters contained in them. In general an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place in which such an instrument ought properly to be. It is true that where
[*795] a connection can be established, so *as reasonably to account for the custody in which the instruments are found, the Courts have somewhat relaxed the rule, and admitted them to be read though not coming from exactly the most proper repository. In *Miller* v. *Foster*, I have reason to believe that the Court of King's Bench, in granting a new trial, proceeded upon the ground of the connection between the terrier and the custody in which it was; and a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend of nearly the same date. But where the custody is merely private and wholly unconnected with the subject-matter, the Courts have never gone the length of admitting such papers in evidence.

In the present case there are considerable circumstances to induce a belief of the authenticity of the instruments produced; the unimpeachable character of the gentleman by whom they are produced, the improbability of any person having had an interest to fabricate them, the appearance of the instruments themselves, and the corroboration given by the induction, which mentions an endowment to have been then lately granted, would

probably be sufficient to convince any mind of their authenticity, if they could be received in evidence consistently with the rules of law.

POTTS v. DURANT.

SITTINGS AFTER MICHAELMAS TERM.

THE ATTORNEY-GENERAL *v.* BOLTON.

(3 Anstr. 820—821.)

1796. *Dec.* 11.

Serjeants' Inn Hall.

[820]

When lands are charged with an annuity for the maintenance of an office, the circumstance of a continued vacancy in the office does not discharge the lands from the arrears.

THIS was an information for a charity.—The testator in 1716 devised certain estates to the ancestor of the defendant, charged with an annuity of 16*l.* a-year as a salary for a clergyman, to be appointed by the devisee, to reside in the village of A. to preach a sermon every Sunday in the chapel there, and to teach six poor children to read and write. The informant, the vicar of the parish in which the village and chapel of A. were situated, insisted that as no person could be admitted to preach in the chapel without his licence, (which he had refused to grant,) and as he had performed that duty, he was entitled to the salary.

Upon the hearing, this claim was abandoned.

The defendant in his answer, said, that he was desirous of executing the trust, but was prevented by the relator's refusing to permit the person he should appoint to officiate in the chapel.

[821]

Scafe, for the defendant, argued that the devisee being only liable to pay the salary to a person answering the description of the charity, held the lands discharged during such time as without his default there was no person to receive it; that therefore there would be no demand for the arrears. He also pressed, that the relator having prayed improper relief, and shaped the whole information with a view to his own demand, which could not be maintained, he ought to pay costs.

Richards for the information.

The COURT clearly held that the defendant ought to account for the arrears of the annuity, and directed the Deputy

ATTORNEY-GENERAL *v.* BOLTON.

Remembrancer to receive proposals for the direction of the charity; they said that as directions were to be given, so that the information had a foundation, the relator should not pay costs.

EXCH. HILARY TERM.

1797. *Jan.* 28.

THE KING *v.* PICKMAN.

(3 Anstr. 852—855.);

[852]

Where goods are in the hands of a sheriff, and are claimed by a subject as seized under a *fi. fa.*; and by the Crown under an extent, as having a lien on the goods for duties, the Court will not stay the proceedings of the Crown, so as to let the question be tried in K. B. It is the prerogative of the Crown to have all questions relating to the revenue decided here.

AN extent issued against the defendant into Surry, for malt duties, and certain goods were returned to have been found upon the inquisition and seized. After the time for claiming had expired, a *venditioni exponas* issued. The goods had been seized under a *fi. fa.* at the suit of one Wells, on process out of K. B. prior to the issuing of the extent, and were then in the possession of the sheriff. The right of the Crown was founded on a claim of lien on the goods, being those subject to the duty. The sheriff had also been ruled in K. B. to return the *fi. fa.* On that ground, Dauncey had this day* applied to the Court of K. B. and obtained a week's enlargement of the rule to return the writ, in order to compel the plaintiff there to indemnify the sheriff, or to litigate the question here. (See 7 Term Rep. 174.)†

He now moved in the same manner to enlarge the time for returning the *venditioni exponas*, for the purpose of making the Crown indemnify the sheriff. He argued that the sheriff as a mere stake-holder, was not to be drawn into litigation in a matter where two parties, claiming the same thing from him called upon him to execute his duty in favour of the one or the other. In a doubtful question the sheriff is not to be obliged to decide and act at his peril. For, besides that the Court always

* Saturday, 28th January. † P. 410, *ante*.

protects its officers in the fair discharge of their duty, it is much more expedient that the merits should be tried *immediately between the parties, who know their own cases, than in an action against the sheriff.—And the practice has accordingly been to enlarge the return in each suit, till one of the parties indemnifies the sheriff, or till they agree to try the question between themselves. *Shaw* v. *Tunbridge*, 2 Bl. Rep. 1064; *Hill* v. *Hook*, in B. R., E. 26 Geo. III.; and *Semple* v. *Lord Newhaven*, M. 24 Geo. III. cited and relied on in the argument in K. B., *R.* v. *Audney*, in Exchequer, 23rd January, 1789, arising upon two outlawries contending for priority.

[*853]

The *Attorney-General:*

In questions between subjects, that practice is very expedient and proper, because their rights are equal: there is the same inconveniency in making the point be disputed upon either return. But the Crown has a prerogative to have every question relating to its revenue decided in the Court which is chosen for that purpose, and whenever that prerogative intervenes, the right of individuals to choose in what Court they will proceed, gives way to it. The point to be ultimately discussed is, whether the Crown had a specific lien on these goods in respect of the duties arising from them. If the Crown is tied up by this motion, and the plaintiff in B. R. refuses to indemnify, or to litigate the matter here, the Crown will either lose the benefit of its execution, or must indemnify the sheriff and support its rights in his name in B. R.

Another reason for the merits being discussed in this suit rather than in B. R. is the form of the proceeding, which permits the plaintiff at law to enter his claim, and try the question immediately with the Crown. If therefore the Court of B. R. *think their officer, the sheriff, entitled to be protected, they ought to stay proceedings there, until the plaintiff shall come in and enter his claim here, and try the question with the Crown. They have in former cases enlarged the time till the parties should consent to indemnify, or to try issues, and may equally well substitute this condition which is suited to the particular case.

[*854]

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He also contended that the sheriff was bound at his peril to execute the process of the Crown.

He therefore refused on the part of the Crown to indemnify the sheriff, or to let the provisions relating to the revenue be called to another tribunal; and insisted, that if the matter could not be otherwise settled, the process of the Crown must be executed.

The COURT were of opinion that the Crown was entitled by its prerogative to have the point discussed here, and assented that the mode proposed was the most proper and eligible for that purpose; but as this depended on the determination of the Court of King's Bench, who had not yet laid the plaintiff at law under such conditions, they thought it would be hard on the sheriff if the *venditioni exponas* issued immediately.

The *Attorney-General* consented to enlarge the return for a week.

On the 11th February, the Court of King's Bench enlarged the time for returning the *fi. fa.* until the second day of the next
[*855] Term, for the purpose *of having the question determined here in the mean time. (See 7 Term Rep. 177.)†

This matter coming on again, and the *Attorney-General* agreeing to waive his right to insist that the time for claiming was expired, the time for making a return was enlarged for eight days, with liberty for the plaintiff in the action in B. R. to come in and claim.

1797. *Jan.* 8.

THE ATTORNEY-GENERAL *v.* APPLEBY.

(3 Anstr. 863—864.)

[863]

Concurrent information against vessel for smuggling, and suit for condemnation as prize, raise no question of election against the Crown.

THE seizing officer returned the vessel in question, as liable to be forfeited for smuggling; and accordingly an information was filed, and now stood for trial on Friday the 10th. At the same time he had instituted a suit in the Admiralty, claiming the vessel as prize as being the property of enemies.

† P. 410, *ante*.

ATTORNEY-GENERAL v. APPLEBY.

Dauncey moved, on behalf of the defendant, for a prohibition against proceeding in that suit; and insisted, that he was entitled to have either that or an injunction, or at least that the seizing officer and the Crown should elect in which Court they would proceed; that his client was doubly vexed by this proceeding, and as the same person was the real party in both suits, and claimed the same thing in each, it came within the spirit of the rule of equity of making a party who proceeds in law and equity elect. If either suit superseded the other, he contended that the forfeiture for the breach of the revenue laws was paramount to the question of its being enemy's property, *because this forfeiture is general, and attaches immediately on any vessel's coming within the prohibition of the revenue laws; whereas the right to prize as enemy's property only vested on the subsequent actual seizure. In the case of *Score* v. *The Lord Admiral*, Parker's R. 273, this principle was admitted, and a prohibition granted upon it.† [*864]

By the COURT:

As to the question of election, that cannot take place here. This suit is by the *Attorney-General* on behalf of the Crown; that in the Admiralty is by the party claiming the prize. As to granting a prohibition, the argument supposes that the Admiralty is proceeding to condemn a vessel, as prize, which was before vested in the Crown, as contraband. The defendant here, by putting in his claim, denies her being forfeited as contraband, and therefore it is not open to him now to suggest in this motion any thing which negatives his own defence. The only way in which the question could have been raised, would have been upon an application by the *Attorney-General* for a prohibition; but that has not been made.

The order was refused.

† Mr. Baron THOMSON remarked, that upon examining the record of that case he found it not to be reported with perfect accuracy. The principle of the decision may also perhaps deserve further consideration. It seems questionable, whether an open enemy, liable, as such, to seizure, is capable of incurring any penalties under our municipal regulations. In general, jurisdiction and protection are co-extensive.

EXCH. SITTINGS AFTER EASTER TERM.

JONES *v.* PRICE.

(3 Anstr. 924—926.)

1797.
June 1.

[924]

Where, by the terms of an auction, the sale is to be completed by a certain day, yet if neither party takes any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaser taking advantage of it at law.

On 22nd September, 1796, the plaintiff put up a certain estate to sale, by public auction. The defendant was the purchaser, and paid in 110*l.* (one-tenth of the purchase money) as a deposit. —By the conditions of sale, the rest of the purchase money was to be paid, and the conveyance made by the 25th of March.— Neither party took any step to quicken the other till the 23rd, when the plaintiff's agent told the defendant it was the plaintiff's wish to have the contract carried into effect. Thereupon the defendant objected that no abstract of the title had been delivered; and added, that unless such abstract and all necessary deeds were ready to be delivered to him on the day stipulated, (the second day thereafter,) he would not go on with the bargain. That being then impossible to be done, he immediately brought an action at law to recover the deposit money. This bill was for an injunction, and specific performance.

[925]

Hart moved for an injunction, on the ground that time is not of the essence of such contracts, unless where the conduct of the parties shews that they mean so to consider it.

Richards, contrà, insisted that time is of the essence of the contract, unless waived, either expressly, or by the conduct of the parties. *Pinke* v. *Curteis*, 4 Bro. Rep. 332; *Smith* v. *Burnham*, 2 Anstr. 527, 3 R. R. 620.

Macdonald, Chief Baron:

There is no case which says that the mere neglect of executing the agreement at the very day shall alone avoid the whole agree-

ment. Certainly the rule formerly adopted, that time should in no case be considered as of the essence of the contract, is too broad. It depends entirely upon the manner in which the parties themselves, by their conduct, shewed that they meant to treat it.

JONES v. PRICE.

Here neither party moved, or intimated a desire that the matter should be immediately arranged. They treated the time therefore as immaterial. Then the defendant's coming, only two days before, to demand performance of a thing then impossible, and which his own conduct had led the plaintiff to suppose was not meant to be insisted upon, is a mere trick to get off from the bargain.

Richards:

The deposit money ought at least to be paid into court, as in *Smith* v. *Burnham*.

The injunction was granted, the plaintiff paying the deposit money into court. [926]

EXCH. SITTINGS AFTER TRINITY TERM.

CHAPMAN *v.* BEARD.

1797. *July* 18. *Serjeants' Inn Hall.* [942]

(3 Anstr. 942—944.)

Fifteen years' possession of a benefice is *primâ facie* evidence of a regular induction, and of reading the thirty-nine articles.

Payment of tithes by the defendant, a parishioner, is *primâ facie* evidence against him of the rector's title.

THIS was a suit for tithes. The defendant in his answer denied the title of the rector, and insisted that he had not been regularly inducted, and that he had not read the thirty-nine articles.—The plaintiff had been fifteen years in possession, and had received tithes from the defendant. No evidence was given of any ceremony of actual induction having taken place; but it was proved that upon the plaintiff's taking possession of the

CHAPMAN v. BEARD.

benefice, the bells were rung by his order; the defendant's witnesses severally proved, that they had generally attended divine service for the two months immediately after the plaintiff's becoming rector, and that none of them had heard him read the thirty-nine articles, or had heard of his reading them. No evidence was given that he had ever read them.—The defendant had paid tithes to the plaintiff for several years.

Richards and *Short* for the plaintiff, relied on *Bevan qui tam* v. *Williams*, 3 Term Rep. 635, n.; *Monke* v. *Butter*, 1 Rol. Rep. 83; Watson's Cl. Law, 652, Gibs. 817.

[943]

Romilly and *Benyon* on the other side:

Induction is a necessary part of the title of the plaintiff, and is the seisin at common law. Possession without it is tortious and voidable; the plaintiff therefore must prove it. Buller's Ni. Pri. 105, and the cases there cited, 1 Sid. 220, &c. The particular form is not material; but unless the Archdeacon, or other ecclesiastical officer, has given corporal possession of the benefice, there is no title.

In the case of *Powel* v. *Milburn*, 3 Wils. 355, it was solemnly settled that the having read the thirty-nine articles by a parson is presumed, unless evidence is adduced to destroy that presumption. It is impossible for the defendant to prove the negative, that the plaintiff never did read the articles; but evidence of several persons regularly attending church, during the first two months, and who did not hear him do so, throws upon him the necessity of proving the fact.

MACDONALD, Chief Baron:

It is a very singular attempt, after fifteen years possession, acquiesced in by the defendant himself, to require the rector now to prove the fact of his induction.—There is no regular ceremony required for that purpose, and there is therefore no presumption of any evidence of it now existing. There is indeed proof of some formal seisin having been taken, by the ringing of bells and the like; but the best evidence of induction at such a distance of time is the possession for fifteen years under it.

As to the other point, I perfectly agree to the rule laid down by Ch. J. DE GREY. But here you *shew no evidence to shake the legal presumption in favour of the incumbent. No doubt is raised. You have not shewn that any witnesses attended all divine service on each Lord's day for two months after the plaintiff's induction, and deny his having read the articles during that time. The circumstance of these witnesses not having heard him do so on those days when they happened to attend, is nothing, unless you can answer for each time that divine service was performed in the two months.

[*944]

HOTHAM, Baron:

There is a strong presumption of both the facts in dispute, from the acquiescence of the parishioners, and of the defendant. If there is any want of title, they should have complained to the Bishop, or disputed it, while the memory of the thing was fresh. There is no record nor repository for the evidence of induction, or of reading the articles; and the witnesses cannot live for ever. If these facts are not to be presumed from length of time, that circumstance which strengthens all other tithes will serve to weaken or destroy this.

THOMSON, Baron:

The circumstance of having himself paid tithes to the plaintiff, is *primâ facie* evidence of the title against the defendant. It was so laid down by Lord KENYON, and BULLER, Justice, in *Radford* v. *Mackintosh*,† and confirmed by the case there cited. I perfectly agree in the doctrine there held.

The defendant was decreed to account with costs.

† 3 Term Rep. 635.

1797.
July 20.

LORD PETRE *v.* BLENCOE AND OTHERS.

(3 Anstr. 945—953.)

[945]

Immemorial non-payment of any tithes from a district cannot raise a presumption of an exemption by grant from the lay-rector; but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful.

THE plaintiff, as impropriate rector, claimed tithe in kind of the defendants' lands in the parish of Mountnessing or Gynge Mounteney, in Essex, being the demesne lands of an ancient monastery, of the Augustine order, of St. Leonard of Thoby. The defendants claimed to hold exempt from tithes. The monastery of St. Leonard was situated within the present boundaries of the parish, and the rectory had from a very early period been annexed to it. It was dissolved in 1524, by a bull from the Pope, and all the possessions vested in the Crown. In 17 H. VIII. that King granted to Cardinal Wolsey the manors and lands of Thoby and Gynge Mounteney, and also the rectory of Gynge Mounteney; after his attainture, the manor of Thoby was granted in 22 H. VIII. to Sir R. Page for life; and in 31 H. VIII. the same subjects were granted, in reversion, to one Berners, under whom the defendants derived title; the grant included the site of the priory, with the church of St. Leonard of Thoby, the belfry, church-yard, &c. (not mentioning tithes,) with all other lands and hereditaments of the monastery in Thoby. In 30 H. VIII. the rectory of Gynge Mounteney was granted for twenty-one years to one H. Wentworth, including the "tithes of the demesne lands of the late monastery." In 37 H. VIII. the rectory was granted to the plaintiff's ancestor,
[*946] including "all the tithes of the demesne lands of the *same priory in Gynge Mounteney, late in the tenure of H. Wentworth." No tithes were in fact ever paid for the demesne lands now in question, which were of very considerable extent; another part of the same demesne lands of Thoby had been decreed to pay tithes in a suit in this Court in 1739; the only defence there set up having been the unity of possession of the tithes and land in the hands of the monastery. Tithes had been paid for that farm ever since.

The defendants rested their claim of exemption on several grounds.

1. That after such a length of non-claim, while the rectory was in the hands of lay-men, a conveyance ought to be presumed.

2. That the district of St. Leonard of Thoby was not parcel of the parish of Gynge Mounteney, but annexed to the church of St. Leonard, either as a separate parish, or as an extraparochial chapelry.

3. That the tithes of the demesnes of Thoby were vested in the monastery, by some title distinct from the rectory, and therefore were not conveyed to the plaintiff.

It was proved that the lands in question were now considered as lying within the parish of Gynge Mounteney,† and there was no trace of their having *ever been otherwise, or of the existence [*917] of any parish or chapelry of Thoby, except from the mention of the church of St. Leonard of Thoby.

It was not clearly ascertained whether the monastery ever had any demesnes in the parish, as belonging to a manor of Gynge Mounteney, distinct from the lands in question, the demesnes of the manor of Thoby.

Burton and *Piggott* for the plaintiff:

The parish must be supposed to have always been of the same extent as at present, unless some evidence is shewn to the contrary. The common law right of the rector must be presumed to cover the whole parish; and when we find him or his predecessors, the monastery, enjoying the tithes of the whole, it must be referred to that general title, unless some particular distinct title to any portion be clearly established.

The existence of the church of St. Leonard is accounted for as a necessary appendage to the monastery, and does not afford any presumption of a distinct parish or chapelry.

† In proving the parochiality of the demesnes of Thoby, some of the witnesses, whose depositions were read, appeared to be parishioners of Gynge Mounteney.

Romilly objected, that they were interested in the parochiality of these lands on account of the contribution to parish rates, and therefore not admissible to move the fact.

The COURT held them admissible, not being interested in the subject of this suit.

LORD PETRE v. BLENCOE.

[*948]

The circumstance of the grant to the plaintiff conveying the tithes of the demesnes of the convent in Gynge Mounteney, distinct from the general grant *of the rectory, is naturally accounted for from the unity of possession till then, in the hands of the monastery, of Cardinal Wolsey, and of the Crown; when the tithes came first to be divided from the land, and capable of a separate perception, the grant, to prevent all doubts, has expressly mentioned them. There is therefore no fair inference that the monastery held these tithes by a title distinct from that to the rectory.

But supposing such an inference to arise, then, if the demesnes of the monastery in Gynge Mounteney, mentioned in the plaintiff's grant, mean the demesnes of Thoby, as lying within the parish, the tithes of those demesnes, the subject of dispute, are expressly granted to us. If the demesnes of Thoby are different from those mentioned in the grant, then the presumption of a distinct title to the tithes does not extend to them.

The conveyance to the defendant of the church, church-yard, belfry, &c. all connected with the church of St. Leonard, without mentioning the tithes, negatives any idea of these having been conveyed to him; and there is no evidence of any conveyances or transmission of the tithes of the demesnes, as a property in the defendant's family, distinct from the land.

If any such right ever existed, it could not merge, and the defendant, Blencoe, would be entitled to take the tithes from the other defendants, his tenants. He is setting up a counter title to

[*949]

*the tithes without any conveyance, or pernancy in any of his ancestors, to support such a claim.

The whole defence therefore resolves itself, in truth, into a claim of *modus in non decimando*, founded on the long non-claim of tithes; but it is clear that such a defence is bad. *Benson* v. *Olive*, Bunb. 284; *Charlton* v. *Charlton*, Bunb. 325; *The Corporation of Bury* v. *Evans*, Com. R. 643; *Nagle* v. *Edwards*, 3 Anstr. 702.—In the two latter cases, the presumption of a conveyance from the lay impropriators was insisted on, but the Court held it to be only another mode of claiming a *modus in non decimando*, and rejected it accordingly.

Here the plaintiff's family being Roman Catholics, could not with

safety stir any question with their neighbours, concerning tithes, and the length of non-claim is therefore no proof against them.

Partridge and *Romilly* for the defendants:

Since the tithes which were vested in the different monasteries, came into the hands of laymen, they have been transferable like any other lay-property, and all rules of construction or presumption of such conveyances ought to apply to them; accordingly grants or conveyances of tithes have been presumed from length of possession; *Scott* v. *Airey*,† *Edwards* v. *Lord Vernon*.‡ The reason why a prescription *in non decimando* could not originally exist, was, because the incumbent could not convey the tithes, and therefore a conveyance by him could not be presumed *from length of time, or any other evidence; but [*950 when the reason ceased to exist, the rule ought to have varied accordingly. Everything which could be lawfully done shall, after long possession, be presumed. *Beadle* v. *Beard*, 12 Co. 5; the *Mayor of Kingston* v. *Horner*, Cowp. R. 102, 12 Mod. 181; *Saubridge* v. *Benton*,§ otherwise the length of possession would be detrimental to the possessors, from the danger of the grants being lost or defaced. The cases which determine that such a presumption cannot exist against a lay-impropriator, may therefore deserve to be reconsidered.

But the present is distinguishable from those cases; in each of them only some particular species of tithes was disputed. But the presumption of accidental omission to collect, or of fraudulent substraction of one species of tithes, is much greater, and the probability of a conveyance of it much less, than when the whole tithes of a large district have been immemorially withheld.

There is a great probability that the lands of Thoby were not originally a part of the parish, and that the tithes of that district were vested in the monastery by some distinct title. That lands might be so annexed to a parish, appears by Seld. Hist. of Tithes, c. 9, s. 4, and the express mention in the grant to the plaintiffs, of the tithes of the other demesnes, seems to imply such a separate title.—There is also some reason to suppose that it was originally a separate parish. For although the existence *of the [*951]

† Vide 1 Anstr. 311. ‡ Vide 1 Anstr. 312. § Vide 1 Anstr. 372.

LORD PETRE v. BLENCOE.

church of St. Leonard may be referable to the monastery, yet it may also be referred to an ancient parish or extraparochial chapelry, of which the memory is now lost. The fact of the plaintiff's ancestors never having demanded tithes from so large a district, can only be accounted for by supposing that it was known, for some reason now with difficulty guessed at, that the tithes of these demesnes were not included in the grant.

It is clear that the grant to the defendants, of all the hereditaments of the monastery in Thoby, would carry the tithes, if not before vested in the plaintiff.

Burton, in reply:

The cases of *Bury St. Edmunds* v. *Evans*, and *Nagle* v. *Edwards*, did not go on the particular circumstance of only some species of tithes being there disputed, but upon the general ground, equally applicable to the present case, that the length of non-payment of tithes to a layman cannot be set up to prove, either a *modus in non decimando*, or a presumed conveyance equivalent to such a *modus*.

In all the cases where conveyances have been presumed, there has been actual possession to raise that presumption. Here the defendant has had no possession of the tithes.

The case stood over till this day.

MACDONALD, Chief Baron, in stating the case, remarked that the express mention of the tithes of the demesnes, after the general grant of the rectory and tithes, seemed to imply some

[*952] peculiarity in the *title to those tithes which could not now be very clearly ascertained.—The mention of the demesne lands in Gynge Mounteney seems to apply to a manor there distinct from the manor of Thoby, and over which alone the grant of tithes to the plaintiff extended.

It is not at all explained why the tithes of these demesne lands were never claimed, till the suit in 1739 as to another parcel of them.—Lord Petre's family were not in fact during all that time under any disability to assert their rights; they were in very considerable power during the reigns of H. VIII., E. VI., Eliz. and J. I., and his ancestor who was first ennobled, was Secretary

of State under Queen Elizabeth and J. I., and a protestant. The reason, therefore, of the tithes never having been demanded must be traced from other sources.

It is now established by many cases too firmly to be disputed, that mere non-payment is not, even among laymen, any answer to the demand of tithes. These determinations are perhaps to be lamented. I should have liked better to have found, in regard to tithes, the same principle of decision which regulates the title to every other lay fee. If non-payment for any length of time forms no presumption of a grant of the tithes, then the length of enjoyment, which in all other cases is the best possible title, serves only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. In the present case it is hardly credible that the plaintiff's family have omitted, for above two centuries, to exert this right, from mere forbearance or negligence. Some other transaction *probably took place between the [*953] parties, the memory of which is now lost. But the cases prevent us from deciding upon the ground of such a presumption.

Although length of time be not of itself a title against the rector, yet if there appear any circumstances which can raise a doubt as to the original extent of his grant, the immemorial non-payment must give infinite force to such circumstances.

Here it is not probable that the lands of Thoby were originally a separate district or parish; and the grants to the plaintiff clearly mark some particularity in the title to the tithes of the demesnes. The searches which have been made as to the original boundaries of the parish, and as to the manors spoken of in the grants, have not gone so far as perhaps they might. It rather seems that the grant applies only to the demesnes of a manor in Gynge Mounteney distinct from the manor of Thoby.—Under such peculiar circumstances, so little explained, and where the possession so strongly fortifies every doubt of the plaintiff's claim, we are of opinion that the case ought to undergo the investigation of a jury, where the whole may be more closely investigated, and every circumstance of evidence receive its proper weight.

The COURT directed an issue, to try whether the plaintiff was entitled to the tithes of the lands in question.

K. B. (AT NISI PRIUS) SITTINGS AFTER EASTER TERM.

1795.
May 22.

TAYLOR *v.* CHAPMAN.

(2 Peake, 19—20.)

[19]

A tenant from year to year by parol will not be discharged from the rent of the current year by an agreement of his landlord to accept a third person as a tenant, unless such agreement is in writing, or the third person take possession, it being a surrender within the Statute of Frauds.

ASSUMPSIT for use and occupation.

The defendant, at Midsummer last, took a house of the plaintiff for one year certain, at the rent of twenty guineas, payable quarterly.

The defendant offered to prove that, after one quarter of a year's rent had been paid, it was agreed between the plaintiff and the defendant, that one Berry should be accepted by the plaintiff as his tenant of the premises, and the defendant discharged.

The plaintiff, on the other hand, contended that this agreement was only conditional, and that in case on inquiry the plaintiff should not approve the character of Berry, he should not accept him. But,

Lord KENYON said, supposing it to be an absolute surrender or assignment of the term, still it would not avail the defendant, for that, by the Statute of Frauds, such surrender or assignment could not be without note in writing.

Garrow, for the defendant, objected that the demise being by parol, might be also surrendered by parol, and that the clause in the statute only related to surrenders or assignments of terms created by agreements in writing.

LORD KENYON:

It equally extends to a surrender of lands demised by parol.

But even considering it as a valid assignment, still the original lessee remains *liable during the whole term, though the assignee is liable only during his occupation.† [*20]

TAYLOR v. CHAPMAN.

Verdict for plaintiff.

Erskine for plaintiff.

K. B. (AT NISI PRIUS) SITTINGS IN AND AFTER TRINITY TERM.

ROBERTS *v.* JACKSON.

(2 Peake, 36—37.)

1795. *June* 24. *At Westminster.*

Implements of trade may be distrained for rent.

[36]

TROVER for goods.

The plaintiff, who was a baker, held a house as tenant to one Hunter, and 30*l.* 13*s.* 6*d.* being in arrear for rent, the defendant, as the bailiff of Hunter, distrained a kneading trough and other implements of the plaintiff's trade. At this time there were no other goods belonging to the plaintiff in the house, but some

† By stat. 29 Car. II. c. 3, s. 3, it is enacted, that no leases, &c. shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party surrendering, &c. the same, or by his agents thereunto lawfully authorized by writing, or by act or operation of law. In cases, therefore, where the substituted tenant has taken possession, and has been accepted by the landlord, the surrender has been held valid, under the latter part of the above section. As in the case of *Thomas* v. *Cook*, 2 B. & A. 119, where A. being tenant from year to year underlet the premises to B., and the original landlord, with the consent of A., accepted B. as his tenant; rent being subsequently in arrear, the landlord distrained upon B.'s goods, and it was held that these circumstances constituted a valid surrender of A.'s interest by act and operation of law, within the above section. So in the case of *Sparrow* v. *Hawkes*, in 2 Esp. 505, MSS. S. C. And again in a late case of *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41, where A. had been tenant of certain premises, and upon his leaving them B. took possession; it was held that, in absence of any evidence to the contrary, it might be presumed that B. came in as assignee of A., although he never paid rent, and that notice to quit was rightly given to B. In like manner the acceptance by the tenant of a new and valid lease, is by implication a surrender of a former lease. *Davison* d. *Brumley* v. *Stanley*, 4 Burr. 2210. So likewise an agreement which has the effect and operation of a lease. *Hamerton* v. *Staed*, 3 B. & C. 478. See also *Phipps* v. *Sculthorpe*, 1 B. & A. 50.

ROBERTS v. JACKSON.

lodgers in the first floor had goods of their own there, which the defendant did not distrain.

Erskine, for the plaintiff, objected that the implements of trade were not distrainable, the more especially as there were other goods which the defendant might have distrained.

LORD KENYON:

Implements of trade may now be distrained for rent, if there are not other goods sufficient to countervail the arrears of rent. They were not distrainable by the common law, for a very good
[*37] reason, for then the very end and aim of the *distress would have been defeated, as the tenant could never have earned money to pay the rent, the distress, at common law, being considered merely as a pledge; but now they may be sold if the rent is not paid in a certain time. The defendant acted very humanely and properly in not distraining the furniture of the lodgers; he had a right to take them, but it would have been cruelty and injustice to have exerted that right while these goods were on the premises.†

Mingay for the defendant.

1795.
July 3.

At Guildhall.

GARRON *v.* GALBRAITH.

(2 Peake, 37—38.)

An adjustment of a policy does not admit the loss.

[37]

ASSUMPSIT on a policy of insurance on silks from Genoa to Lisbon. The declaration stated an average loss by the perils of the seas.

The defendant had been applied to to adjust the average, and then signed an acknowledgment in the following words: viz. "Agreed to pay 44*l*. 6*s*. 6*d*. for particular average on this policy, payable in one month."

[38] *Erskine*, for the plaintiff, contended that this was *primâ facie*

† See now Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, s. 4), following the provisions of the County Court Act, 1846, now embodied in 51 & 52 Vict. c. 43, s. 147. —R. C.

evidence of the loss, and that it was incumbent on the defendant to shew that there was not a loss.

GARRON v. GALBRAITH.

Gibbs, for the defendant, objected that the plaintiff must prove the loss, and cited the case of *Rogers* v. *Mayler*, Sittings after Trinity Term, 1790, wherein Lord KENYON so decided.

LORD KENYON:

I shall consider this adjustment as an admission of the policy, but nothing further. It is still incumbent on the plaintiff to prove the rest of his case. One may put cases without end, where many inconveniencies and much injustice would happen, were the law otherwise.*

The plaintiff not having evidence, was nonsuited.

Gibbs said that in the case of *Rogers* v. *Mayler*, *Mr. Erskine* relied on the cases of
in Mr. Park's book, which Lord KENYON overruled.†

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

GIBSON *v.* SPURRIER AND ANOTHER.

(2 Peake, 49.)

1795. *Dec.* 5. *At Westminster.* [49]

Where a man purchases at an auction two distinct lots which adjoin, and which would more conveniently be occupied together, he is not obliged to go on with the purchase of either, unless the seller can make a good title to both.

ASSUMPSIT for money had and received.

The action was brought for the purpose of recovering from

* In *Christian* v. *Combe*, Lord KENYON held that an adjustment made under a full knowledge of all the circumstances of the case, would be *primâ facie* evidence of the circumstances, but that it would not prevent the party from shewing that he was misinformed as to any part, or imposed upon, or that, mistaking the law, he had promised to pay a demand to which he was not liable. MSS. Sittings after Trin. Term, 36 Geo. III. 1796.

† See Park on Insurance, c. 6. *Hogg* v. *Goldney*, Sittings after Trin. Term, 1745, *ibid.*; *Christian* v. *Combe*, 2 Esp. C. 489; Stark. Evid. iv. 1169.

[GIBSON c. SPURRIER.

the defendants (who were auctioneers) a sum of 270*l.* paid them as a deposit on the purchase of some premises at Enfield. By the particulars of sale they were represented as freehold premises, and no notice was taken that they were liable to any incumbrance or right of common.

The plaintiff purchased two lots; one a house, garden, &c. the other a meadow close adjoining thereto, and which he wished to occupy therewith; but on finding that this meadow was liable to a right of common every third year, he insisted on rescinding the contract.

Erskine, for the defendant, insisted that though this incumbrance might avoid the contract as to the second lot, yet it would not affect the agreement for the purchase of the first, and therefore as to that the plaintiff was not entitled to receive back his deposit.

LORD KENYON:

If these lots were so near each other that the hope of possessing one as an appendage to the other was the inducement to the plaintiff to purchase both, he ought not to be compelled to take one alone: this is not so much a question of law as a matter of convenience; it would be saddling a man with an estate for which he might have no use.

1795. *Dec.* 11.

SMITH *v.* GIBSON AND WIFE.

(2 Peake, 52—53.)

[52]

Money advanced to place out an infant apprentice, not recoverable on a promise by infant to repay, as not being for necessaries.

ASSUMPSIT for money paid, laid out and expended to the use of the wife before her coverture.

The plaintiff and the wife of the defendant were brother and sister, and each had a sum of 300*l.* as a fortune. In the year 1792, the sister being then under age, the plaintiff paid a sum of 40*l.* to a woman of the name of Smith, as a premium for taking the sister as an apprentice to learn millinery; and a letter was

read from the sister to the plaintiff, wherein she expressed her gratitude to him for this mark of his kindness, and hoped it would be in her power to pay him soon. But she was under age *when this letter was written, and no subsequent promise was proved. SMITH v. GIBSON. [*53]

Lord KENYON declared himself clearly of opinion that this sum of money could not be considered as necessaries, and therefore that the payment of it could not be enforced in a court of law. Where a man does an act of generosity for an infant, he relies wholly on the generosity of the infant to make a suitable return. The infant ought to make a due return, but it is a duty of imperfect, not of legal obligation.†

K. B. (AT NISI PRIUS) SITTINGS AFTER HILARY TERM.

HODGES *v.* HODGES.

(2 Peake, 79—80.)

1796. *Feb.* 25. *At Guildhall.* [79]

If a husband treats his wife cruelly, and A. takes her into his house and provides her with necessaries, he may maintain an action against the husband, but cannot maintain any action for the education of the children.

ASSUMPSIT, for the board and lodging of plaintiff's wife and children, and for money paid, laid out and expended.

The defendant and his wife living very uncomfortably together and he having frequently struck her, she left his house, took several of her children with her, and went with them to the house of the plaintiff, her son, who received and put some of the children to school; and to recover satisfaction for the board of

† Sed vide Co. Litt. 172 (*a*), where it is said an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards. In 1 Sid. 112, *Pickering* v. *Gunning;* Palm. 528; Sir William Jones, 182. [*Walter* v. *Everard*, '91, 2 Q. B. 369, C.A., 60 L. J. Q. B. 738. —F. P.]

HODGES v. HODGES.

the wife, and the money expended in educating the children, brought the present action.

Lord KENYON advised the parties to settle the cause out of Court, not only on the account of the near degree of relationship between them, but also because the case itself would be attended with difficulty in point of law, and complete justice could not be done. If a husband turned his wife out of doors he sent a credit with her; and his lordship said he was inclined to go further than he believed any other Judge had gone before him. He was inclined to say, that if he behaved in such a way as to render it unsafe and dangerous for her to reside with him, that in that case the plaintiff would be entitled to recover for the board of the wife; further he could not go, for the wife might apply to the Spiritual Court for a divorce.

As to the children, they did not appear to have been driven
[*80] from the defendant's house; and at all *events nothing could be recovered on account of the money paid for their education. A father was bound by every social tie to give his children an education suitable to their rank, but it was a duty of imperfect obligation, and could not be enforced in a court of law. The richest man in the kingdom might say to his heir apparent, "Go and earn your daily bread by your daily labour," and the law could not interfere. There is no further obligation than that which nature has implanted in his breast. The law obliged him to nothing but nurture, which duty expired when the child reached the age of seven.

The parties not agreeing to a reference, the cause proceeded, and it appearing that the defendant had afterwards requested his wife to return, Lord KENYON again pressed the parties to settle the dispute between themselves, when they agreed to withdraw a juror.

Erskine and *Lawes* for plaintiff.

Mingay for defendant.

K. B. (AT NISI PRIUS) SITTINGS AFTER EASTER TERM.

THE KING *v.* JOHN REEVES, ESQ.

(2 Peake, 84—87.)

1796.
May 20.

At Guildhall.

In an information for a libel the jury are to consider whether the defendant published it with a criminal intent or not. [84]

THIS was an information filed by the *Attorney-General ex officio*, against the defendant, for a libel on the Constitution.

The *Attorney-General*, in his opening, stated that this information had been filed by him by the direction of His Majesty, in consequence of an address of the House of Commons to him for that purpose. The House had resolved it to be a malicious, scandalous and seditious libel, tending to create jealousies, and divisions amongst His Majesty's liege subjects, and to alienate the affections of the people of this country from the Constitution. The information pursuing this resolution, charged the defendant with an intention to cause it to be believed that the regal power and government of this realm might, consistently *with the freedom of this realm as by law [*85] established, be carried on in all its functions, though no Parliaments were holden; and the fourth count stated that it was done with intent to bring the power of the two Houses of Parliament into contempt. The question for the opinion of the jury, he said, was whether the defendant had published this book with the criminal intention charged in the information. If, on reading the whole of the pamphlet, the jury should be of that opinion, it was their duty to find the defendant guilty; but if, on the other hand, they should think that this was a mistaken execution of a good purpose, the defendant was entitled to an acquittal. He did not call for a verdict upon an inaccurate expression or ill-considered argument, if used with a good purpose.

Plummer, for the defendant, argued the merits of the

THE KING v. REEVES.

pamphlet at considerable length, contending that the book was published for a good purpose, to counteract republican principles and that the defendant was worthy of praise, and not of censure, for the publication.

The *Attorney-General* replied.

Lord KENYON said that the power of free discussion was the right of every subject of this country. It was a right to the fair exercise of which we were indebted more than to any other that was ever claimed by Englishmen. All the blessings we at present enjoy might be ascribed to it. It opened the way for the Reformation, and afterwards for the Revolution, and by its means were men emancipated from religious slavery in the one
[*86] case, and the tryanny of the Stuarts *in the other. When right was abused and excrescences arose, they might be lopped off, but at the same time, in a free country like ours, the productions of a political author should not be too hardly dealt with. In this country a defendant could never be crushed by the name of his prosecutor, however great that name might be: this was not the first prosecution commenced under the direction of the House of Commons which had failed. In *The King* v. *Stockdale*†

† After the articles of impeachment against Mr. Hastings, as the Governor-General of India, were preferred by the House of Commons, and before they were carried up to the Lords for trial, copies of them were printed and sold in every shop in London; a Rev. Mr. Logan, a minister of Leith, in Scotland, sent to Mr. Stockdale, who in the usual course of his business published a Review of these articles of impeachment. In this Review the auther very strongly advocated the cause of Mr. Hastings, and was very severe in some of his observations against the accusers of that gentleman, and certainly in part thereof attributed to his accusers malicious and personal motives. "This Review having immediate and extensive sale, a complaint was made by Mr. Fox (who was one of the principal managers of the impeachment), to the House of Commons, and upon his motion the House unanimously voted an address to the King, praying his Majesty to direct his Attorney-General to file an information against Mr. Stockdale, as the publisher of a libel upon the House of Commons, which was filed accordingly. The cause was tried before Lord Kenyon and a special jury at Westminster, on the 9th of December, 1789, and the jury found a verdict for the defendant of not guilty." The address to the jury of the then Attorney-General Sir Archibald M'Donald, the speech of Mr. Erskine for the defendant, and the reply of the Attorney-General, together with

the House of Commons were also the prosecutors, *but the defendant in that case was not weighed down by the weight of the prosecution, nor did the jury hold themselves bound to find the publication a libel because the House of Commons had voted it to be such.† The jury were in that case advised to read the whole of the book, and from the whole taken together to decide on the delinquency or innocence of the defendant. Although the jury are to form their judgment upon the particular passage stated in the information, they may compare that with the whole book, and see how it is qualified by it.‡

The jury were out a considerable time, and afterwards returned to the bar and said that they were of opinion that the pamphlet was highly improper; but, nevertheless, thought that the defendant was not actuated by a bad motive, and therefore found him

Not guilty.

Lord KENYON said he approved of the verdict.

the summing up of Lord Chief Justice Kenyon, will be found, together with the above account, in Ridgway's Collection of Erskine's Speeches, vol. ii. 205.

† See the observations of Lord Kenyon in that case, Erskine's Speeches, vol. ii. p. 286.

‡ In the case of *Rex* v. *Lambert and Perry*, 2 Camp. 400, Lord ELLENBOROUGH permitted parts of the same paper (in which the alleged libel was contained), upon the same topic with the libel, although locally disjoined from it, to be read. See also *Cooke* v. *Hughes*, 1 R. & M. 112. And it appears that in the trial of Horne Tooke for treason the matter was carried much further, for in that case the prisoner was allowed to read in his defence various extracts from other works published by him at a former period of his life; and the jury were permitted to carry these along with them when they retired to consider of their verdict. Lord ELLENBOROUGH, however, expressed his doubt as to the propriety of admitting such evidence as was then admitted. 4 Camp. 403, citing Gurney's Trial of Horne Tooke.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

1796.
Dec. 3.

[93]

THE KING *v.* BENESECH.

(2 Peake, 93—94.)

Perjury cannot be assigned on an answer in Chancery denying a promise absolutely void by the Statute of Frauds.†

INDICTMENT for perjury in answer to a bill filed against the defendant by Martin and wife, in the Court of Chancery, stating that the wife was niece to the defendant, and that when Martin was about to marry her, the defendant promised to pay him 1,000*l.* as a marriage portion.

The defendant, by his answer, insisted that as there was no promise in writing, he was entitled to the benefit of the Statute of Frauds, but as to the fact, denied that he had ever made any such promise, on which denial perjury was assigned.

When *Erskine* was beginning to open the prosecutor's case, he was stopped by

Lord KENYON, who said that he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and supposing it in fact to have taken place and acknowledged by defendant, could not be enforced either at law or in equity: that Court had no power to decree a performance *of it. It might be a false swearing, but did not amount to what the law denominated perjury.

[*94]

The defendant was therefore acquitted without examining a witness.

Erskine and *Lawes* for the prosecutor.

Mingay for the defendant.

† *Rex* v. *Dunston*, 1 R. & M. 109, accord.

K. B. (AT NISI PRIUS) SITTINGS AFTER EASTER TERM.

CAREY *v.* PITT, Esq.

(2 Peake, 130—131.)

1797.

The handwriting of a person (being a M.P.), cannot be proved by a witness who has never corresponded with him or seen him write; and who is called to speak merely from acquaintance, as inspector of franks at the Post Office, with writing purporting to be franks of that M.P. Nor is the opinion of such a witness as to genuineness, upon comparison of handwriting, receivable in evidence.

[130]

ASSUMPSIT on a bill of exchange, drawn by one Crofton, against the defendant as acceptor.

The defendant insisted that the acceptance was a forgery; and amongst other evidence, the plaintiff called a witness of the name of Coulson, who was an inspector of franks at the post-office, to prove that he had frequently seen franks pass the office in defendant's name (he being a member of Parliament), and that from the character in which those franks were usually written, he believed this acceptance to be the defendant's hand-writing. He had never seen the defendant write, or received any letters from him.

Lord KENYON said this was not admissible evidence. The farthest extent to which the rule had been carried, was to admit a person who had been in the habit of holding an epistolary correspondence with the party to prove the hand-writing from the knowledge he acquired in the course of that correspondence. A case reported in Fitzgibbon† was the first in which that evidence was admitted. That evidence was admitted on sound principles; for if, when letters are sent directed to a particular person on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose hand-writing it purports to be; but the franks sent to the office might be the defendant's hand-writing, or they might be forgeries as well as the *present, for no communication was had on the subject with the defendant.

[*131]

† *Lord Ferrers* v. *Shirley*, Fitz. 195.

CAREY v. PITT.

Garrow then asked the witness whether, having been used to detect forgeries, he could say this was a genuine hand-writing.

LORD KENYON, said he would not receive this, and observed that though such evidence was received in *Rivett* and *Braham*,* he had, in his charge to the Jury, laid no stress upon it.

Verdict for defendant.

Erskine for defendant.

K. B. (AT NISI PRIUS) SITTINGS AFTER TRINITY TERM.

KNOBELL *v.* FULLER AND ANOTHER.

(2 Peake, 139—141.)

1797. *July* 8.

At Westminster, in C. B.

[139]

In an action for a libel the defendant may, on the general issue, prove in mitigation of damages any ground of suspicion short of facts which would, if pleaded, have amounted to a complete justification.

ACTION on the case for a libel published in the *Morning Post* of the 16th January, 1797, charging plaintiff with being concerned with Launcelot Knowles in procuring money from the relations and friends of persons convicted of capital offences, under pretence of being able to procure pardons through the interference of the Duke of Portland, in whose service the plaintiff was.

The defendant pleaded the general issue, and in mitigation of damages, offered evidence to prove that, though the plaintiff was not prosecuted for the offence as Knowles had been, there was nevertheless strong grounds of suspicion against him.

The CHIEF JUSTICE at first doubting the admissibility of this evidence,

[140] *Adair*, Serjt. for the defendant, admitted that the defendant could not give in evidence, on the general issue, facts which, if pleaded, would have amounted to a justification, but contended

* 4 T. R. 497.

that they might prove facts which showed there was cause of suspicion; and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff, but for the purpose of conveying information to the public, this being a concern of a public nature: and *Runnington*, Serjt. who was on the same side, read a note of a case of *Curry* v. *Walter*,† C. B. Sittings after Hilary Term 36 Geo. III. where EYRE, Ch. J. admitted the distinction and received such evidence.

EYRE, Ch. J. said he believed that in that case he admitted the evidence, in order to show that the defendant had not, in fact, published a libel, he having only published the proceedings of a Court of Justice, which the Court afterwards determined to be no libel in point of law; but he would not deny but he might also have received it in mitigation of damages, for though he had never known the evidence given in an action for a libel, yet he had always understood that, in an action for words, the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had a justification been pleaded.

The defendants then called Mr. Ford, a magistrate, to prove that on the examination of the plaintiff before him, he admitted that he had received five guineas for conveying a letter to the Duke, and the Duke himself being examined, said that, thinking the plaintiff had misconducted himself in *that respect he had discharged him from his service. [*141]

The Jury nevertheless found a verdict for the plaintiff (damages 200*l.*) against the defendant Fuller. The other defendant not being proved to be a proprietor of the paper, a verdict was found for him.

Sheppard, Serjt. for the plaintiff.‡

† See Stark. Evid. vol. ii. p. 877 (*n*).

‡ The following is a copy of the libel:—"The proverb that one man may steal a horse, while another dare not look over a hedge, was never more fully verified than in the case of the persons concerned in procuring pardons. Launcelot Knowles, evidently the agent and dupe of Knoble, has been tried and deservedly

KNOBELL v. FULLER.

Note.—Though the particular ruling in this case is questionable upon later authority, the case is retained as one of a number of decisions at *nisi prius* upon a question admitting of much discussion. The cases are collected in the judgment of CAVE, J. in *Scott* v. *Sampson* (1882) 8 Q. B. D. 491, 51 L. J. Q. B. 380; which itself is questioned by HAWKINS, again is referred to by HAWKINS, J. in *Wood* v. *Earl of Durham* (1888) 21 Q. B. D. 501, 508, 57 L. J. Q. B. 547.—R. C.

1797.
July 19.

At Guildhall.

[141]

CHRISTIN AND ANOTHER *v.* DITCHELL.

(2 Peake, 141—143.)

On a representation that a ship will sail with convoy, whereby the plaintiff was induced to put his goods on board; the promise is complied with if she follows the convoy and joins it, so as to prevent the plaintiff from maintaining an action against the owner for a loss arising from another cause after she has joined.

Aliter if by reason of this representation the owner of the goods, in an insurance made thereon, was induced to warrant that she would sail with convoy.

ASSUMPSIT. The declaration stated that in consideration the plaintiffs would ship, on board the defendant's vessel called the *Cromer*, certain goods to be taken from London to Oporto, the defendant promised that the ship should sail with convoy, and

[*142] *that the plaintiffs, relying on that promise, did ship the goods on board the vessel, and caused insurance to be made thereon with a warranty to sail with convoy. That the ship afterwards sailed without convoy, and was lost; and by reason of such sailing without convoy, the plaintiff was prevented from recovering the loss from the underwriters.

The plaintiff called the captain of the ship, who proved that the ship arrived at Spithead, the rendezvous for Oporto ships, on the 23rd of May, previous to which the Oporto fleet, under convoy of the *Aurora*, had sailed and was then off the Isle of Wight; that in order to overtake the convoy he sailed between

convicted; but the latter, the honest and faithful servant of his Grace of Portland, though the principal actor in the abominable practices, is suffered to escape punishment, and permitted to enjoy the full exercise of his liberty: this is justice from an offender, who ought at least to have accompanied his wicked acquaintance to Botany Bay."

the Needles, which was a shorter passage, and came up with the rear of the convoy off Falmouth on the 24th; that he afterwards got a-head of the commodore's ship, and received verbal orders from him; and after continuing in company some days, was separated in a hard gale of wind and lost. To prove the promise, printed papers were read, whereby the *Cromer*, a constant trader, was represented as being about to sail with the first convoy. And further, it was proved that the broker told the plaintiff's agent that the ship was to sail with convoy.

CHRISTIN v. DITCHELL.

LORD KENYON:

This ship did not sail with convoy; and as a warranty is always construed strictly, the underwriters were discharged, and therefore the plaintiff ought to recover a compensation from the defendants. I proceed in this case merely on the ground of the policy, for if the plaintiffs had only complained of having lost the goods for want of a convoy, I should have thought they had failed in *their claim; in that case no real injury would have been sustained by them, for the ship did in fact reach the convoy, and was not lost by reason of her not having joined when it first sailed; but here they have sustained an injury, they have lost their insurance, and that by the defendant not having performed his promise by joining before the convoy sailed.

[*143]

Verdict for plaintiff.

SUTTON AND ANOTHER, SURVIVING PARTNERS, *v.* GREGORY AND ANOTHER.

(2 Peake, 150—152.)

1797. *July 25.* *At Guildhall.* [150]

The entry of a clerk, deceased, in the book of a notary public, is evidence.

ASSUMPSIT on a bill of exchange for 930*l.*, dated at Boston, in North America, and drawn by the defendants on Lewis & Potter, by the description of Messrs. Lewis & Co.—Bill accepted, not paid.

Potter being partner in the house of Lewis & Potter in London, and also in the house of Gregory & Potter in America, in

SUTTON v. GREGORY.

order to accommodate the former house, directed a clerk of that house to draw the bill in question in the name of Gregory & Potter, which bill was afterwards accepted by another clerk of the same house the moment it was drawn, having been drawn in London, though dated at Boston. The bill was payable to Mather & Co., and was indorsed by them to the plaintiffs for a valuable consideration.

A witness was called, who proved that, by an entry in a notary's book by a clerk since deceased, it appeared that this bill had been presented.

Gibbs objected that this was not sufficient evidence of the fact.

[151] Lord KENYON was of opinion it was, and instanced the case of goods sold where an entry by a person deceased had been admitted.

The plaintiffs also produced the protest.

[152] *Verdict for plaintiffs.*

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

1797. *Dec.* 6.

At Westminster.

WEBB *v.* FOX AND ANOTHER.

(2 Peake, 167—168.)

Calico printers have a lien for the general balance.

[167] TROVER for dimities and other goods.

The goods in question had been delivered to the defendant, who was a calico printer, for the purpose of being printed; and when they were finished, the plaintiff tendered the money demanded by the defendant for printing these particular goods, but the defendants refused to deliver them up unless they were also paid a sum of money previously incurred for printing other goods, which the plaintiff refused to pay.

Gibbs, for the defendants, contended that the defendants had, by the common law, a general lien in this case. WEBB v. FOX.

But Lord KENYON being of opinion that this case fell within the rule laid down in *Green* and *Farmer*, 4 Burr. 2214, and that the defendant could have *no lien unless by special usage of the trade or the agreement of the parties: [*168]

The defendant called a witness, who proved that such was the universal mode of dealing in the trade, and that in an action wherein he was a defendant, the right had been litigated and established; and upon this evidence,

The defendant obtained a verdict.

Erskine and *Best* for plaintiff.

Gibbs and *Dampier* for defendant.

K. B. (AT NISI PRIUS) SITTINGS AFTER TRINITY TERM.

DOE *d.* JONES *v.* RICHARDS.

1798.

(*Ex relatione* WILLIAMS, Sergeant.)

(2 Peake, 180.)

Oxford Spring Circuit. Monmouth, coram LAWRENCE, J.

Reputation of lands being part of a manor, and copyhold, good evidence.

[180]

EJECTMENT for lands.

The lessor of the plaintiff contended that the lands in question were copyhold, and part of the manor of Usk and Trelage. The defendant contended they were freehold.

The plaintiff, amongst other evidence, called witnesses to prove that it was the constant reputation of the neighbourhood that these lands were part of the manor, and copyhold; and on an objection to this evidence,

LAWRENCE, J. said it was good evidence, and mentioned a

DOE v. RICHARDS.

case where Mr. J. WILSON, having received such evidence, he moved for a new trial on the ground that it was not admissible, but the COURT of C. B. were so clear that it was proper to be received, that they refused even a rule to shew cause.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

1799. *Dec.* 12.

At Westminster.

[183]

BULLER AND OTHERS *v.* FISHER AND OTHERS.

(2 Peake, 183—184.)

Goods laden on board a ship, the bill of lading containing an exception of the perils of the seas; the ship runs foul of another ship, without any fault in the master of either: held to be an injury by the perils of the seas, within the exception.

ASSUMPSIT against the defendant for not safely carrying goods delivered him by the plaintiff to be carried on board his ship.

The bill of lading contained the usual exception of the perils of the seas, and it appeared, from the evidence, that the injury to the plaintiff's goods on board happened by reason of another ship running foul of that belonging to the defendant; that this was a mere accident, and that it was impossible to attribute any blame to the master of either vessel.

Erskine, for the plaintiff, contended that this accident did not fall within the meaning of the exception in the case of perils of the seas. Those perils were only such, he contended, as were occasioned by what the law called the act of God, that is, the perils of the elements.

Lord KENYON said that this was a case purely for the jury; whether this was a peril of the seas, was a fact, and they alone were competent to find it, but that, delivering his opinion, he was clear it was such a peril; it appears to have been an accident which no prudence or skill in navigation could have avoided, such as every person navigating a ship was liable to,

and therefore he thought the owners were not liable to this action. BULLER v. FISHER.

There were seven special jurors who were about to *find a verdict for the defendant, when the plaintiff's counsel consented to a nonsuit. [*184]

Erskine, *Gibbs* and *Giles*, for plaintiff.

Garrow and *Park* for defendant.

K. B. (AT NISI PRIUS) SITTINGS AFTER EASTER TERM.

——— AND OTHERS *v.* JACKSON.

(2 Peake, 185—186.)

1800.
June 6.

At Guildhall.

[185]

Where no terms of carriage are fixed by law, a carrier is entitled to say on what terms he will carry, and to make a charge for booking.

On his refusal to carry unless the booking fee is paid, he cannot be sued in assumpsit for not carrying safely.

ASSUMPSIT against the defendant, as a common carrier, for not safely carrying a chest of tea from London to Leeds.

The plaintiffs sent the tea in question, and two other chests, to the defendant's warehouse, when the book-keeper then insisted on being paid 2*d*. for booking them, and refused to take any charge of them unless that money was paid. The servant, in consequence of previous orders from the plaintiffs, refused to pay the demand or take away the goods, but left them at the warehouse. At that time the waggon was nearly packed, and no notice taken of the chests, but afterwards the two other chests were sent by the defendant's waggon, and arrived safe at the place of their destination. That in question was never found, but supposed to be stolen by some person when it was first left at the warehouse.

Erskine, for the plaintiffs, in opening, contended that the [186]

——— v. JACKSON.

defendant could not insist on the payment of this 2*d.* for booking or warehouse room; he could only demand compensation for the carriage, and upon payment of that the defendant was obliged to carry them.

LORD KENYON:

There are Acts of Parliament which authorized justices of the peace to fix the rates to be taken by carriers, and I have known instances of applications to the sessions for the purpose; but when no rate is by law fixed, the carrier is entitled to say on what terms he will carry: he is not obliged to take everything which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him. The old mode of declaring used to be on the custom of the realm; but this is in assumpsit, it is founded in contract, and the contract must therefore govern the parties.

Law, who was also for the plaintiffs, said that, in 2 Show. 327, it had been ruled that a carrier was like an innkeeper, and could not refuse to take in goods delivered to him to carry.

Nonsuit.

Mingay and *Bedford* for defendant.

1802.

At West-minster.

[210]

LACEY *v.* LEAR AND ANOTHER.

(2 Peake, 210—211.)

If a tenant quit without any intention of returning, the landlord may enter without bringing ejectment.*

TRESPASS for breaking and entering plaintiff's house, and seizing and converting his goods.

The plaintiff held a house of the defendants as tenant from year to year, and carried on the trade of a pastry-cook and muffin-maker therein. Previous to Christmas last, the defendants gave the plaintiff notice to quit at Midsummer next, and on the 6th of January, there being half a year's rent due, and the plaintiff himself being then gone, the plaintiff's wife and

* See *Turner* v. *Meymott*, 1 Bing. 158.

children left the premises, taking with them the stove on which they made muffins, and all their goods, except a show-glass, a broken bedstead, and a broken chair. The house remaining shut up about a fortnight, the tax-gatherer, at the request, as it appeared, of the defendants, broke open the door, with the assistance of a constable, and distrained for 4*s*. 6*d*. land-tax; the defendants then took possession of the house and let *it to another tenant, to whom they sold the show-glass for 18*s*. Rent was at this time due to them, but they made no distress, nor gave any notice under the statutes.

LACEY v. LEAR.

[*211]

Lord ALVANLEY said, that as to the breaking and entering the house, it was a mere question for the Jury to say whether at the time the plaintiff's family so quitted the house, there was any *animus revertendi* on his part. That when a tenant kept possession of a house, and left it only for a temporary purpose, the landlord certainly could not take possession; but if he wholly abandon his house without any intention of returning, the landlord is not obliged to see his house fall to pieces for want of due care being taken of it, but may, if he can peaceably do so, take possession of it. That the circumstance of the plaintiff's family having taken away the utensil by which they earned their living, strongly indicated an intention not to return; and if the Jury was of that opinion, the trespass, as far as it consisted in breaking and entering the house, was not made out, but that the defendants had acted irregularly in seizing and selling without notice the goods which they found in the house, and as to that, the plaintiff must have a verdict.

Verdict for plaintiff, 11*s*. *damages*.

Best and *Reader* for plaintiff.

Shepperd for defendants.

K. B. (AT NISI PRIUS) AFTER HILARY TERM.

1805.

Worcester Spring Assizes, before LAWRENCE, J.

[232]

THE KING *v.* EDWARD RUDGE, WILLIAM RUDGE, AND ANOTHER.*

(2 Peake, 232—233.)

If a witness is on cross-examination asked a question on some collateral matter, in order to affect his credit, he cannot be contradicted by calling another witness for that purpose.

THE defendants were indicted for stealing a quantity of stockings from an outhouse belonging to the house of William Preedy.

Amongst other witnesses, the prosecutors called a man of the name of Waring to prove that he purchased part of the stockings stolen, from the prisoners; he said he did this by the direction of the prosecutor, merely for the purpose of obtaining evidence against the prisoners, who were suspected of having several times robbed the prosecutor's warehouse. On cross-examination, he was asked several questions as to his former connection with the prisoners; as to his house having been searched for coining instruments; and as to his having before bought and sold old copper and brass under suspicious circumstances. He answered these questions by saying, it was true his house had been searched on suspicion of his having been engaged in coining, but that nothing had been found in his house, nor had he in fact coined any thing but some copper tokens for a house at Bristol, some of which he produced; and that as to the copper and brass, he had never bought any but openly, and without any suspicion of its having been stolen. To discredit this witness, *Clifford*, for the prisoner, called another, and was about to inquire of him the circumstances attending these transactions.

[233] LAWRENCE, J. said, that the only way in which a witness could be discredited was by general evidence of persons who were

* Vide *Spencely* v. *De Willott*, 7 East, 108.

acquainted with him, as to their belief of his credibility on his oath; that if the witness was himself asked as to any particular part of his conduct, his answer must be taken; and that he would not permit counsel, by asking questions of the witness himself as to his conduct on particular occasions, to avoid the general rule which the law had laid down for the ascertaining of credibility, and to entitle himself to go into evidence of particular facts, and, under the pretence of contradicting the witness, to call witnesses who should give a history of his whole life.

THE KING v. RUDGE.

The prisoner was convicted of the simple larceny.

K. B. (AT NISI PRIUS) SITTINGS AFTER MICHAELMAS TERM.

DANIEL *v.* PIT.

(2 Peake, 238—239.)

1806. *Dec.* 2.

Where defendant agrees to be bound by what a third party says, what such third party said is evidence.

[238]

THIS was an action for the price of a load of Portland stone sold by the plaintiff to the defendant.

The only question was, whether the stone sold by the plaintiff to the defendant had been delivered to the defendant by a person of the name of Coombe, who was dead; and the evidence to prove the delivery was, that the defendant agreed that if Coombe would say he had delivered the stone, he (the defendant) would be bound by it. Coombe, upon being asked, said that he had delivered the stone, but this was not said in the defendant's presence: upon that ground *Marryat* objected to the evidence.

But Lord ELLENBOROUGH, Ch. J. admitted the evidence, adding that this very point had been decided in the case of *Mr. Hastings*, who having referred to one of the Begums upon a charge of having received some money, was held to be bound *by her [*239]

DANIEL v. PIT.

declaration, although such declaration was probably false, and went to impute a delinquency.*

1812.

Gloucester Lent Assizes.

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DOE *d.* THOMSON AND OTHERS *v.* PEARCE.

(2 Peake, 242—244.)

Where by virtue of a custom certain persons called free-miners were at liberty to apply to the gaveller of the hundred of St. Briavels to allot them a particular spot of land for a coal-pit; and when the spot was agreed upon, the gaveller cut a turf, and having cut a stick, so many notches were cut in it as there were to be partners in the intended work, and also one for the King and one for the gaveller; that the stick was fastened down with pegs on the spot where the turf had been pared off, and the turf laid down again, after which that spot was considered appropriated; when coal was found a money payment was made to the King in lieu of his share of the coal: A share in a coal-pit so appropriated was held to be freehold.

IN this case the lessors of the plaintiff claimed as devisees in remainder named in the will of William Thomson; the defendant claimed as a purchaser under Sarah, the widow and executrix of William Thomson; so that the only question in the cause was, whether the property in question was freehold, subject to the limitations of the will, or whether it went to the executrix as a chattel interest.

The property in dispute consisted of a share of a coal-mine in the forest of Dean, within the hundred of Saint Briavels; and it appeared that (the land within the forest belonging to the Crown) it had from time immemorial been the custom for persons of a certain description, called free-miners (viz. those who, being born within the hundred, had worked as miners for a year and a day), to apply to the graveller of the hundred, or his deputy, to allot them a particular spot of land for a coal-pit; that the work was generally undertaken by a number of persons as partners, and when the spot was agreed upon, the servant of the gaveller cut a turf, and having cut a stick, so many notches were cut in it as there were to be partners in the intended work,

* In the case of *Williams, Spinster*, v. *Innes* and others, *Executors*, &c., such evidence was received, although the person referred to was living, and might have been called. 1 Camp. 364; and see in note.

and *also one for the King and one for the gaveller; that the stick was fastened down with pegs on the spot where the turf had been pared away, and the turf laid down again; after which the spot was considered appropriated, and no other person took possession of it. The present deputy-gaveller said, that during his time there had always been paid a small annual rent until they began to find coal, as a compensation for the timber allowed out of the forest for the work, and as soon as coal was procured a gale was set, which was also an annual money payment for the King's share of the coal; that he had never known any other than a money payment, but he had heard from his predecessor, and other old people now dead, that in former times, when they could not agree, a man used to be put in to work on the part of the King, and take his share of the coal gotten from the pit; that sometimes the work would be abandoned, and if that happened for a year and a day the King took possession and the payment ceased. It was also proved that the general reputation of the hundred was that this was freehold property, and that it went to the eldest son on the death of the first adventurer, and many instances were adduced of its having so descended, but some instances were also shown of the widow having taken possession and sold to others, even where there were children. One old witness stated that he remembered courts being formerly holden within the hundred, at which twelve free-miners attended as a jury, and the steward presided; but no very distinct account was given of the constituton of the court, no records appeared to be in existence, nor did it appear that any written admissions or *grants of the right in question had ever been made. It was also proved that till of late years the only mode of transfer known was delivery of the possession of the windlass, but that a practice had since prevailed of conveying by feoffment, lease and release, passing fines, &c. [*244]

On this evidence the counsel for the lessor of the plaintiff contended that this was freehold: but the defendant's counsel, on the contrary, submitted that if there was any right at all it was a mere chattel; but that in fact it was nothing more than a licence, and conveyed no right whatever.

DOE v. PEARCE.

WOOD, B.:

I think that this is clearly freehold; it is the same kind of right that exists among the miners in the Peak in Derbyshire, which has been always so considered; and therefore it must be liable to the same limitations as any other freehold property.

Dauncey and *Abbott* for plaintiff.

Jervis, *Peake*, and *Puller*, for defendant.

*Verdict for plaintiff.**

* The nature of the right is now defined by statute. See 1 & 2 Vict. c. 43, s. 31; 24 & 25 Vict. c. 40, s. 1. —R. C.

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—— 3. **Wrongful distraint upon landlord's goods.** *See* **Landlord and Tenant**, 18.

And see **Practice**, 5; **Crown**, 2; *and* **Trespass.**

EXECUTOR—1. If an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt. *Quick* v. *Staines* 801

—— 2. Executor who died before probate, held entitled to a legacy given for his care and loss of time in the execution of the trusts of the will. *Harrison* v. *Rowley* 193

And see **Bond**, 1.

EXPULSION—Of member, from company. *See* **Mandamus.**

FIRE—Liability for rent, after destruction of premises by. *See* **Landlord and Tenant**, 9.

FORCIBLE ENTRY.—An indictment at common law, charging the defendants with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, is good. *Rex* v. *Wilson* 694

FOREST OF DEAN—Customs of.—Where by virtue of a custom certain persons called free-miners were at liberty to apply to the gaveller of the hundred of St. Briavels to allot them a particular spot of land for a coal-pit; and when the spot was agreed upon, the gaveller cut a turf, and having cut a stick, so many notches were cut in it as there were to be partners in the intended work, and also one for the King and one for the gaveller; that the stick was fastened down with pegs on the spot where the turf had been pared off, and the turf laid down again, after which that spot was considered appropriated; when coal was found a money payment was made to the King in lieu of his share of the coal: A share in a coal pit so appropriated was held to be freehold. *Doe* d. *Thomson* v. *Pearce* 908

FRAUD—1. Bill of exchange—Wrongful pledge. *See* **Bill of Exchange, 3.**

—— **2. Of agent.** *See* **Principal and Agent;** *and* **Landlord and Tenant, 1.**

FRAUDS, STATUTE OF—1. Parol promise.—By Statute of Frauds, no action will lie in respect of a parol promise to pay the debt of another and also to do some other things. The plaintiff cannot separate the two parts of such a contract. *Chater* v. *Beckett* 418

—— **2. Question of fact.**—The Statute of Frauds requires, not that a trust shall be created by writing, but that it shall be proved by writing; which may be subsequent to the commencement of it.

The Lord Chancellor upon appeal held that the case was not within the Statute of Frauds: the question being, whether a partnership subsisted in the trade of a colliery; a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing, as an incident to the trade, by operation of law.

A partnership in land may be proved by parol evidence. *Forster* v. *Hale* 128

And see **Landlord and Tenant, 14, 16;** *and* **Criminal Law, 3.**

FREIGHT. *See* **Ship, 2.**

GOODS, SALE OF—1. Delivery and payment.—In an action for the non-delivery of corn at S. pursuant to an agreement whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a tender of the price or what is equivalent thereto. *Morton* v. *Lamb* 395

—— **2. Undisclosed principal.**—If a factor, who sells on a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. *George* v. *Clagett* . 462

—— **3. Stoppage in transitu.**—A consignor's right of stopping goods *in transitu* is not taken away by the consignee's having partly paid for the goods. *Hodgson* v. *Loy* 483

GOODS acquired since bankruptcy, right of bankrupt to. *See* **Bankrupt, 1.**

GREAT SEAL—Pardon, if pleaded, must be averred to be under. *Bull* v. *Tilt* 780

GUARANTY—Promise to answer for goods supplied to another.—A promise in writing directed to A. B. and C., a house in trade, to pay for goods to be furnished to another, cannot be enforced in an action by B. and C. to recover the value of goods furnished after A. had withdrawn from the partnership. *Myers* v. *Edge* 436

HABEAS CORPUS. *See* **Criminal Law, 4.**

HANDWRITING—Proof of. *See* **Evidence, 4.**

HUSBAND AND WIFE—1.—**Adultery of wife—Liability of husband for necessaries supplied to wife.**—Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery; held, that the husband should be liable for necessaries furnished to her unless it appeared that the plaintiff knew or ought to have known the circumstances under which she was living. *Norton* v. *Fazan* 785

—— 2. If a husband treats his wife cruelly, and A. takes her into his house and provides her with necessaries, he may maintain an action against the husband, but cannot maintain any action for the education of the children. *Hodges* v. *Hodges* 889

ILLEGAL CONSIDERATION. *See* **Bond, 4.**

IMPOSSIBILITY—By act of law.—If a defendant be sent out of the kingdom under the alien bill after he has given a bail bond, and before the return of the writ, the Court will order the bail bond to be delivered up to be cancelled, on the ground that performance of the condition has become impossible by an act of the government under a statute. *Postell* v. *Williams* 516

INFANT—1. **Action founded on contract.**—A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant. *Jennings* v. *Rundall* 680

—— 2. **Necessaries.**—Money advanced to place out an infant apprentice, not recoverable on a promise by infant to repay, as not being for necessaries. *Smith* v. *Gibson* 888

—— 3. Heir of mortgaged copyhold lands, foreclosure not allowed during minority. *Spencer* v. *Boyes* 209

—— 4. **Legacy to.** *See* **Will, 29.**

INSPECTION—Of deeds. *See* **Deeds.**

INSURANCE (FIRE)—Days of grace.—In a policy of insurance against fire by loss from half a year to half a year, the assured agreed to pay the premium half yearly "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid; held that the insurers were not liable, though the assured tendered the premium before the end of the fifteen days, but after the loss. *Tarleton* v. *Staniforth* 845

INSURANCE (MARINE)—1. **Adjustment of average.**—An adjustment of a policy does not admit the loss. *Garron* v. *Galbraith* . . 886

—— 2. **Agreement to return part of premium.**—The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived;" held that the assured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured and the assured had been obliged to pay for salvage. *Aguilar* v. *Rodgers* 478

—— 3. **Average.**—If an insurance be effected on fruit, and the policy contain the usual memorandum, "corn, fruit, &c. warranted free from average unless general, or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, though no part of the loss arise from the act of stranding. *Burnett* v. *Kensington* 424

INSURANCE (MARINE)—4. Commencement of voyage.—Insurance on a voyage from C. to D. on a representation that the ship was first to sail from A. to B. and from B. to C.; the voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A., from thence proceeded immediately to C., and in performing the voyage from C. to D. was lost; and this was held a good commencement of the voyage insured. *Driscol* v. *Passmore* 782

—— 5. **Deviation.**—A deviation of a vessel from the voyage insured through the ignorance of the captain, or from any other motive not fraudulent though it avoids the policy, does not constitute an act of barratry. *Phyn* v. *The Royal Exchange Assurance Company* 508

—— 6. A ship insured from A. to B. sails with intent to touch at C. To a certain point the voyage is the same; from that point there are three tracks to B., one of which is still on the course to C.; there are advantages and disadvantages attending each of the three tracks, and a captain bound for B. must elect according to circumstances; the ship passes the dividing point and takes the track towards C. with intent to put in there; but before she comes to the second dividing point where she must leave the track to B. in order to put into the harbour of C., is captured. The underwriter is discharged; because he was entitled to the advantage of the captain's judgment in electing which of the three tracks it was best to pursue when he came to the first dividing point. *Middlewood* v. *Blakes*. 405

—— 7. **Evidence of loss.**—The plaintiff's agent shewed to the defendant, an underwriter, the captain's protest containing an account of the loss of the ship insured, demanding payment: held that this did not entitle the defendant to read the protest in evidence in an action on the policy. *Senat* v. *Porter* 403

—— 8. **Form of policy—Compliance with statute.**—If the name of the broker effecting a policy of insurance be inserted in the policy as "agent," it is a sufficient compliance with the 28 Geo. III. c. 56. *Bell* v. *Gilson* 823

—— 9. **Illegal contract—Custom.**—An action will not lie against an agent for not entering into an illegal contract of insurance, notwithstanding a prevailing practice on the part of underwriters to pay losses on such insurances without dispute. *Webster* v. *De Tastet* 402

—— 10. **Insurable interest.**—A. being indebted to B. without any order from him consigns goods to C. to be held for B. and indorses the bill of lading to C.; resolved that B. had an insurable interest in the goods so consigned. *Hill* v. *Secretan* 806

—— 11. A. having consigned a cargo to B. and drawn bills on him to the amount of it, in favour of C. his general agent, sends these bills together with the bills of lading to C., desiring him to transmit them to B. "that B. may have an opportunity of insuring." He also draws a bill for 300*l.* on C., which is accepted; B. refuses to take to the cargo or accept the bills drawn on him: C. then effects a policy in his own name, and informs A. thereof, who approves of his conduct. In an action by C. stating himself in the first count to be the agent of A. and averring interest in him; in the second averring interest in himself: held, first, that the policy was good within 28 Geo. III. c. 56; secondly, that C. had an insurable interest to the amount of 300*l.* *Wolff* v. *Horncastle* 808

—— 12. Commissioners appointed by the Crown, under the authority of an Act of Parliament, which enabled them "to take into their possession and care all Dutch ships and effects detained or brought into the ports of Great Britain, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive from his Majesty and his Privy Council," may insure in their own names such ships and effects, after

seizure abroad, and while they are *in transitu* to this country. *Craufurd* v. *Hunter* 576

INSURANCE (MARINE)—13. **Captor's interest in prize.**—Captors of ship seized as prize may insure their interest therein, and are not entitled to a return of premium, although it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the Court of Admiralty. *Boehm* v. *Bell* 620

—— 14. **Warranty.**—Sailing orders are necessary to the performance of a warranty to depart with convoy unless particular circumstances exempt the insured from the general rule. *Webb* v. *Thomson* 757

—— 15. **Warranty of neutrality.**—In an action on a policy of insurance on goods warranted American, on board a ship from London to Virginia, a sentence of a foreign Court, which after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired and loaded at London, and having on board eighty barrels of gunpowder, declares the ship and cargo a good prize," is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion. *Calvert* v. *Bovill* 517

—— 16. **Warranty of neutrality—Judgment in rem.**—By the sentence of a French Court of Admiralty, it appeared that the ship insured warranted American, had been condemned as enemy's property, for want of having on board a *rôle d'équipage* or list of the crew, such as is required by marine ordinance of France and adjudged by the Court there to be requisite within the meaning of the treaty of commerce between France and America; held to be conclusive evidence against the warranty of neutrality, though in fact the ship was American. *Geyer* v. *Aguilar* 543

—— 17. A warranty in a policy of insurance, that the ship is American property means that the ship is entitled to all the privileges of an American flag: and if she has no passport on board (which is required by the treaty between France and America) the warranty is not complied with, and the assured cannot recover against the underwriter, though in fact the ship suffers no inconveniences in the voyage from the want of the passport. *Rich* v. *Parker* 552

—— 18. A warranty of Danish property (Denmark being then a neutral power) in a policy of insurance on ship and goods, was holden to be conclusively disproved by a sentence of a Court of Admiralty condemning the ship and cargo because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship which had been seized and carried into port by a belligerent power, for the purpose of search. Any forfeiture of neutrality by the wilful act of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty. *Garrels* v. *Kensington* 635

JUDICIAL PROCEEDINGS—Report of. *See* **Libel, 4.**

JUSTICE OF THE PEACE. *See* **Churchwarden.**

KING—Party to case. *See* **Practice, 2.**

LANDLORD AND TENANT—1. **Assignment of lease to avoid liability.**—There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession, nor receives the lease. *Taylor* v. *Shum* 759

—— 2. **Covenant.**—A lessee, who had covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso that the landlord might in such case re-enter, gave a

warrant of attorney to confess judgment, on which the lease was taken in execution and sold; held no forfeiture of the lease. Otherwise, if the warrant of attorney has been given for the express purpose of enabling such creditor to take the lease in execution under the judgment. *Doe* d. *Mitchinson* v. *Carter* 586

LANDLORD AND TENANT—3. **Implied covenant in lease.**—On an agreement for a lease, "with all usual and reasonable covenants," a covenant not to underlease or assign is implied where the custom of the place is not generally against it. *Folkingham* v. *Croft* 844

—— 4. **Distraint for rent.**—Implements of trade may be distrained for rent. *Roberts* v. *Jackson* 885

—— 5. **Distraint upon goods of stranger.**—The goods of a stranger on the premises of another were distrained by the landlord for rent in arrear; and the stranger was obliged to pay the rent to redeem them: held that the stranger might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenants to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Exall* v. *Partridge* . . . 656

—— 6. **Recovery of rent.**—If A. tenant for life subject to forfeiture, remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C., his executor may, on shewing that he acquiesced under a false apprehension recover from C. the amount of the rent erroneously paid to B. *Williams* v. *Bartholomew* 816

—— 7. **Re-entry.**—If a tenant quit without any intention of returning, the landlord may enter without bringing ejectment. *Lucey* v. *Lear* . 904

—— 8. **Holding over.**—A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton* v. *Costar* 481

—— 9. **Liability for rent after destruction of premises by fire.**—A tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent, notwithstanding the premises are destroyed by fire. *Hare* v. *Groves* 835

—— 10. **Notice to quit.**—A notice delivered to a tenant at Michaelmas 1795, to quit at Lady-day, "which will be in the year 1795," was held to be a good notice to quit at Lady-day 1796. *Doe* d. *Duke of Bedford* v. *Kightley* 375

—— 11. If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainderman. But if the remainderman accept rent, as rent, after the death of the tenant for life, it is evidence by way of admission of a tenancy from year to year, an admission that the defendant is his tenant, and then he is entitled to notice to quit. *Doe* d. *T. Martin & Jones* v. *Watts* 387

—— 12. Where tenant for life grants a lease for years, which is void against the remainderman, and the latter before he elects to avoid it receives rent from the tenant, whereby a tenancy from year to year is created, yet this is with reference to the old term, and therefore a half-year's notice to quit from the remainderman ending with the old year is good. *Doe* d. *Collins* v. *Weller* 496

—— 13. **Parol lease.**—Though by the Statute of Frauds it is enacted that all leases by parol, for more than three years, shall have the effect of estates at will only, such a lease enures as a tenancy from year to year. *Clayton* v. *Blakey* 575

LANDLORD AND TENANT—14. **Parol agreement—Specific performance.**—Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense and continuance of possession after the expiration of the old lease and payment of an increased rent under the agreement: plea of the Statute of Frauds ordered to stand for an answer with liberty to except. *Wills* v. *Stradling* 26

—— 15. **Re-entry for non-payment of rent.**—Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due; nor under the stat. 4 Geo. II. c. 28, s. 2, if there be a sufficient distress on the premises. *Doe* d. *Forster* v. *Wandlass* 393

—— 16. **Statute of Frauds.**—A tenant from year to year by parol will not be discharged from the rent of the current year by an agreement of his landlord to accept a third person as a tenant, unless such agreement is in writing, or the third person take possession, it being a surrender within the Statute of Frauds. *Taylor* v. *Chapman* 884

—— 17. **Sub-tenant cannot dispute title of superior landlord.**—If B. claiming under A. let lands for a year to C. and die, and A. afterwards bring an ejectment against C., C. cannot dispute the title of A. *Barwick* d. *Mayor and Aldermen of Richmond, in Yorkshire*, v. *Thompson* 499

—— 18. **Wrongful distraint upon landlord's goods.**—Where goods leased as furniture with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease, because to maintain such an action he must have the right of possession as well as the right of property at the time. *Gordon* v. *Harper* 369

—— 19. The jury may presume an old satisfied term surrendered to the *cestui que use*, in order to substantiate a lease executed by him. A bill in Chancery is no evidence of the facts contained therein, not even of those on which the prayer of relief is founded. *Doe* d. *Bowerman* v. *Sybourn* . 363

LAND-TAX — Judgment of commissioners conclusive in action against officer for trespass. *See* **Trespass**, 1.

LEASE FOR LIVES—Renewal.—Bill by devisee in remainder to him and his heirs male of a lease for lives against tenant for life, also entitled in reversion to him and his heirs, to compel him to procure a renewal, one life having dropped: the construction of the will being, that the lease should be kept full, and that 500*l.* and no more should be charged thereon for that purpose upon the dropping of each life, decreed, that if the plaintiff chose to pay the excess, the lease should be renewed, in trust to secure the 500*l.*, and, subject thereto, for the defendant for life; after his decease to raise the farther sum advanced by the plaintiff for renewal and the expense of the suit, with compound interest at 4 per cent. during the life of defendant; and, subject thereto, for plaintiff in tail male; remainder to defendant and his heirs.

Affirmed on Appeal by Lord Ch. ELDON, who added an express direction that the tenant for life ought to have kept down the interest.

Tenant for life of an estate for lives being himself one of the lives, it is not competent to the remainder-man to compel him to contribute to the expense of renewal, if it is a legal estate: *Qu.* if a trust.

The rule, that tenant for life of an estate for lives shall pay one-third of the expense of renewal, was unreasonable, and does not now prevail: the fair proportion is, that he shall keep down the interest, like the devisee of a mortgaged estate. *White* v. *White* 161

LEGACY. *See* **Will.**

LEGACY—To infant—Satisfaction. *See* **Will, 29.**

LEX LOCI CONTRACTUS. *See* **Contract, 2.**

LIBEL—1. Form of pleading.—An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false. *Rex* v. *Burks* 365

—— 2. **Justification.**—In an action for a libel the defendant may, on the general issue, prove in mitigation of damages any ground of suspicion short of facts which would, if pleaded, have amounted to a complete justification. *Knobell* v. *Fuller* 896

—— 3. **Motive.**—In an information for a libel the jury are to consider whether the defendant published it with a criminal intent or not. *Rex* v. *Reeves* 891

—— 4. **Report of judicial proceedings.**—An action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual. *Quære:* Whether the matter of justification ought not to be pleaded? *Curry* v. *Walter* 717

—— 5. **Report of parliamentary proceedings.**—The Court refused to grant a criminal information against a bookseller for printing a report of the House of Commons, though it reflected on the character of an individual. *Rex* v. *Wright* 649

—— 6. A letter written to a third person called plaintiff "a villain," held actionable, without proof of special damage. *Bell* v. *Stone* 320

—— 7. **Upon member of House of Lords.** *See* **Lords, House of.**

LIEN.—Calico printers have a lien for the general balance. *Webb* v. *Fox* 900

LORDS, HOUSE OF—Breach of privilege—Libel.—The House of Lords having voted the defendant guilty of a breach of privilege in publishing a libel upon a member of their House, and having sentenced him to pay a fine of 100*l.* and to be imprisoned six months and until such fine was paid, which commitment was returned into this Court upon a habeas corpus sued out by the defendant, the Court refused to discharge him out of custody. *Rex* v. *Flower* 662

MAGISTRATES.—The granting of a warrant by, is a judicial and not a ministerial act. *Harper* v. *Carr* 440

MAINTENANCE.—Bill for discovery, whether the plaintiffs were not employed by one defendant, a Peer, as solicitors to present and prosecute a petition on behalf of the other defendant, complaining of a return of a member of Parliament, and praying that he might be duly elected: demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law.

The office of a pleader is not to make a case, but to state it fairly according to his instructions.

Maintenance justifiable from the privity of the parties in estate, or their connection, as master and servant. *Wallis* v. *The Duke of Portland* . 78

MAJORITY—Power of to bind minority.—If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. A condemnation by four out of the six triers of leather appointed under 1 Jac. I. c. 22 (the whole number being met for the purpose of trying), must be considered as the condemnation of all six. *Grindley* v. *Barker* 787

MANDAMUS—Return.—In a return to a mandamus to a corporation to restore a member who has been removed it should appear that the body removing had proved the charge for which the member was removed. It is not sufficient to state merely that he was present when the charge was made, and did not deny it. *Rex* v. *Faversham Fishery Co.* 691

And see **Practice, 6.**

MANOR—1. Right to inspect court-rolls.—A freehold tenant of a manor has no right to inspect the court-rolls, unless there is some cause depending in which his right may be involved. *Rex* v. *Allgood* 574

—— 2. It seems that a custom for the homage to assess a compensation in lieu of a heriot, is unreasonable and void.

Evidence that the homage have been accustomed to assess a certain sum of money as a heriot upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for a heriot in kind upon alienation. *Parkin* v. *Radcliffe* . 797

And see **Common; *and* Copyhold.**

MARRIED WOMAN. *See* **Husband and Wife; *and* Will, 6.**

MIDDLESEX REGISTRY. *See* **Registration.**

MONEY RECEIVED.—Where money has been paid by the plaintiff to the defendant under the compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. *Marriot* v. *Hampton* 439

MORTGAGE—1. Foreclosure.—Copyhold lands mortgaged in fee by lease and release as freehold; the customary heir is bound by a covenant for farther assurance: but during his infancy the Court refused to foreclose; and would go no farther than directing the account, and that in default of payment the plaintiffs should be let into possession, and hold and enjoy, till the heir should attain twenty-one, at which time he should surrender; and a day was given to shew cause against the decree. *Spencer* v. *Boyes* . 215

—— 2. **Equity of redemption.**—Baron and feme seized in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption, by lease and release, to the mortgagee; the mortgagee remains in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy, from whom he had his conveyance: the heir of the wife is not barred of his equity of redemption by lapse of time. *Corbett* v. *Barker* 856

—— 3. **Of tolls.** *See* **Toll.**

MORTMAIN—Statute of. *See* **Will, 32, 35.**

NEUTRALITY—Warranty of. *See* **Insurance (Marine), 15, 16, 17, 18.**

OFFICE—Annuity for maintenance of. *See* **Annuity, 2.**

ORDER—In Council. *See* **Contract, 6.**

PARDON.—A pardon, if pleaded, must be averred to be under the great seal. *Bull* v. *Tilt* 780

PARLIAMENT—Member of—Attachment.—The Court will not grant an attachment against a member of Parliament for non-payment of money according to an award. *Catmur* v. *Knatchbull* 489

PARTNERSHIP—1. Articles of partnership under seal do not imply power to any partner to bind the others by deed. *Harrison* v. *Jackson* 422

—— 2. A partnership in land may be proved by parol evidence. *Forster* v. *Hale* 128

—— 3. **Assignment of partnership effects for benefit of creditors.** *See* **Bankruptcy**, 3.

—— 4. **Change in firm.** *See* **Guaranty.**

PEER—**Attachment.**—The Court will not grant an attachment against a peer for not paying a sum of money awarded, though the defendant consent on condition that the attachment shall lie in the office for a certain time. *Walker* v. *The Earl of Grosvenor* 410

PENALTY.—When a statute creates a penalty and says that one moiety shall be to the use of the King and the other to a common informer, the King may sue for the whole unless a common informer has commenced a *qui tam* suit for the penalty.—In such a case the King may recover the penalty by an information filed by the Attorney-General in this Court. *Rex* v. *Hymen* 524

PERJURY. *See* **Criminal Law**, 2, 3.

POOR LAW—1. **Appeal to Quarter Sessions.**—Where the Quarter Sessions are held at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original sessions but before the adjourned sessions, an appeal at the next ensuing adjourned sessions is in time, and ought to be received. *Rex* v. *The Justices of Sussex* 390

—— 2. **Time for appeal against removal.**—An appeal against an order of removal may be entered at the next Sessions but one after the order is executed, if there be not a reasonable time between the execution of the order and the next Sessions to make inquiries respecting the pauper's settlement. *Rex* v. *The Justices of Flintshire* 417

POOR RATE—**Tolls.**—A navigation act empowered the proprietors to take so much per mile per ton, for all goods carried along the canal; held that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, where the respective voyages finished; though for their own convenience, they were authorized to collect the tolls where they pleased, and did in fact collect them in other parishes. *Rex* v. *The Staffordshire and Worcestershire Canal Navigation* 683

And see **Churchwarden.**

POSSESSION.—1. An incumbrancer who is in possession, not in that character but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver. *Archdeacon* v. *Bowes* . . 855

—— 2. Fifteen years' possession of a benefice is *primâ facie* evidence of a regular induction, and of reading the thirty-nine articles. *Chapman* v. *Beard* 875

And see **Ejectment**, 1; **Landlord and Tenant**, 18.

POWER—**Of appointment.**—1. A. having both a power and an interest, the estate being conveyed to such uses as he should appoint, and in default of appointmment, to him in fee, conveys by lease and release, using also words of appointment: the deed operates as a conveyance of his interest, not as an execution of his power: especially if the effect of the latter construction will defeat the object. *Cox* v. *Chamberlain* 311

POWER—2. **Estates created by execution of—Rule in.**—In considering whether an estate created by appointment and limited to commence *in futuro* is invalid for that reason, the estate is to be considered as if inserted in the original deed by which the power was created. *Venables* v. *Morris* 455

—— 3. An appointment exceeding the power by a limitation to objects not within the power is void as to the excess; as where the power is to appoint to children, and the appointment is to a child for life, and after his decease to his wife and children: but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving. *Crompe* v. *Barrow* 318

PRACTICE.—1. Plea of a suit depending in the Court of Chancery in Ireland for the same matter overruled. *Lord Dillon* v. *Alvares* . . . 206

—— 2. A defendant in a case where the King is party, cannot carry down the *nisi prius* record to trial by proviso, because no laches can be imputed to the King. *Rex* v. *Dyde* 542

—— 3. The Court will grant leave to enter the continuances after verdict in order to arrive at the justice of the case. *Doe* d. *Mears* v. *Dolman* . 525

—— 4. **Discovery.**—A defendant to ejectment is not compellable to discover his own title so far as not affecting the title of the plaintiff. *Mutloe* v. *Smith* 854

—— 5. **Fi. fa.**—If a *fi. fa.* be *teste'd* before defendant's death, but delivered to the sheriff and executed after, the execution is regular. *Wayborne* v. *Langmead* 739

—— 6. **Mandamus.**—A return (to a mandamus to restore) insufficient, because it did not state that the party had been summoned to answer to the charge before he was removed. *Rex* v. *Gaskin* 633

—— 7. **Solicitor plaintiff—Original writ.**—An attorney plaintiff may sue by common process and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney. *Jackson* v. *Barnard* 374

—— 8. **Warrant to confess judgment.**—To satisfy the rule requiring the presence of an attorney on behalf of a prisoner (person) executing a warrant of attorney to confess a judgment, the presence of the plaintiff's attorney is insufficient; though the defendant consent to his acting as his attorney also. *Hutson* v. *Hutson* 367

PRESUMPTION—Of yearly tenancy. *See* **Landlord and Tenant**, 11.

PRINCIPAL AND AGENT—Fraud of agent—Account.—Account between principal and agent settled from loose papers; the agent having kept no regular books: after his death liberty was given to surcharge and falsify upon allegation of errors since discovered.

Agent, employed to sell estates, took them for himself under colour of a fictitious purchase, and sold part: after his death an inquiry was directed to ascertain the real value; according to which his estate was to be charged: the principal having an option to take what remained unsold; and, the agent having fraudulently prevailed on his principal to execute a lease at a rent under the real value, the agent's estate was charged with the loss arising from that. *Lord Hardwicke* v. *Vernon* 244

And see **Goods, sale of**, 2.

PRISONER OF WAR—Disability. *See* **Alien enemy.**

PRIVILEGE—1. **Assignment of.** *See* **Bankruptcy**, 1.

—— 2. **Breach of.** *See* **Lords, House of.**

PRIZE — Captor's interest in, is insurable. *See* **Insurance (Marine)**, 13.

PROMISSORY NOTE—1. In assumpsit brought by an administrator *de bonis non* the promise may be laid to have been made to the first administrator. *Hirst* v. *Smith* 415

——— 2. A note, by which A. promises to pay the bearer 50*l*. "being the portion of a value as under deposited in security for the payment thereof," may be declared upon as a promissory note. *Haussoullier* v. *Hartsinck* 561

PUBLIC POLICY. *See* **Maintenance.**

QUARTER SESSIONS. *See* **Poor Law.**

RECTORY—Evidence of grant of. *See* **Tithe**, 2; *and* **Evidence**, 8.

REGISTRATION—Of conveyance—Priority.—A registered conveyance of premises in Middlesex for valuable consideration established against prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jolland* v. *Stainbridge* . . 64

REPORT—Of judicial proceedings. *See* **Libel**, 4.

RIOT.—The hundred are not liable in an action for damages brought by the person injured by a mob beginning to pull down his house, &c., unless the riot be of such a kind as to amount to felony within the stat. 1 Geo. I. st. 2 c. 5. *Reid* v. *Clarke* 505

SAILOR. *See* **Insurance (Marine)**; *and* **Ship.**

SALE OF GOODS. *See* **Goods, sale of.**

SALVAGE. *See* **Insurance (Marine).**

SEAMAN—Wages of. *See* **Alien enemy.**

SEA-WALL—Liability to repair.—If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected at the expense of the whole level. *Rex* v. *The Commissioners of Sewers* 659

SECRETARY OF STATE—Commitment by warrant of. *See* **Criminal Law**, 4.

SETTLEMENT (MARRIAGE)—1. Settlement decreed according to a letter previous to the marriage; though no express assent: the marriage having taken place immediately, a distinct, positive, dissent would be necessary to prevent the effect of the letter: and that could be evidenced only by an actual settlement before marriage. *Luders* v. *Anstey* . . . 276

——— 2. By a marriage settlement, an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses, appoint, and for want of such appointment reversion to herself in fee: during her husband's life she made a will in pursuance of the power, devising the estate to A. in fee: after which she and her husband executed a lease of part of the settled estate to the defendant, not executed pursuant to the power; and after her husband's death she received rent from the defendant: Held that such lease was voidable only by her upon her husband's death; and that her receipt of rent accruing afterwards, was a confirmation of it against A. who claimed under her appointment by the will. *Doe* d. *Collins* v. *Weller* 493

——— 3. **Covenant.**—Covenant in a marriage settlement to settle leasehold estates in trust for such persons and such or the like estates, ends, intents and purposes, as far as the law would allow, as declared concerning real

estates limited to the first and other sons in tail male, with several remainders: the Court in executing the covenant declared, that no person should be entitled to the absolute property, unless he should attain twenty one, or die under that age, leaving issue male. *The Duke of Newcastle* v. *The Countess of Lincoln* 3

SETTLEMENT (MARRIAGE)—4. Covenant—Satisfaction.—Settlement, previous to marriage, of the wife's fortune on herself, with a covenant by the husband in consideration of the marriage, &c., and for making some provision for the wife and her issue, to pay within three months after his death 6,000*l.* to the trustees, in trust, if the wife should survive him, and there should be no issue (which was the event), to pay, 1500*l.* to the wife her executors, &c., and to pay the interest of the remaining 4,500*l.* to her for life: she is entitled to dower; and her share under the Statute of Distributions is not a satisfaction or performance of the covenant. *Couch* v. *Stratton* 23

SHERIFF—Wrongful distraint by. *See* **Landlord and Tenant,** 18; *and* **Crown,** 2.

SHIP—1. Freight.—A ship bound for London after taking in her cargo but before breaking ground was cut out of her port of lading in Jamaica by a French privateer, but was afterwards re-captured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters: held that the owners of the ship were not entitled to any part of the freight. Though by the usage of the trade the ship was loaded at their expense. *Curling* v. *Long* . . 747

—— 2. **Sale of command.**—A sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge of the Company, is illegal: and the contract of sale cannot be the foundation of an action. *Blachford* v. *Preston* 598

See **Charter-party; Contract,** 4, 6; *and* **Insurance (Marine).**

SLANDER—1. Justification.—It is no justification to an action of slander, to plead that such an one told the slander to the defendant. *Davis* v. *Lewis* 373

—— 2. **Loss of profits.**—In an action for consequential damage from slander, imputing incontinence to the plaintiff, it is enough to state that he was employed to preach to a dissenting congregation at a certain licensed chapel situated at A.; that he derived considerable profit from his preaching; and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and otherwise would have given," without saying who those persons were. *Hartley* v. *Herring* 614

SLAVE—Not legal subject of insurance. *See* **Insurance (Marine),** 9.

SMUGGLING. *See* **Crown,** 1.

SOLICITOR—1. The relation of attorney and client, together with apparent irregularity, is sufficient ground for opening up a stated and settled account. *Sir Watkin Lewis* v. *Morgan* 860

—— 2. Plaintiff, may sue by common process and indorse his own name on copy as solicitor, and may afterwards declare by another solicitor. *Jackson* v. *Barnard* 374

—— 3. **Service under articles.**—The stat. 2 Geo. II. c. 23; requiring (as a previous qualification to being admitted as an attorney) that the party shall continue in the service of the attorney to whom he is articled for five years, is not complied with by the clerk serving part of the time with another attorney, with his master's consent, and the rest of the time with his master. *Hill, Ex parte* 492

SOLICITOR—4. **Warrant of attorney.**—If a defendant in custody being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney; the Court will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney. *Jeyes* v. *Booth* 771

SPECIFIC PERFORMANCE. *See* **Landlord and Tenant, 14.**

STOPPAGE IN TRANSITU. *See* **Goods, Sale of, 3.**

SUNDAY.—A rule *nisi* for an attachment of non-payment of money, pursuant to the Master's allocatur, cannot be served on a Sunday. *M'Ileham* v. *Smith* 597

TENANT FOR LIFE—Produce of timber.—A. tenant for life; remainder to his sons successively in tail male; remainder to B. for life and to her sons in the same manner; with trustees to preserve contingent remainders; A., being also seised of the reversion in fee, cut and sold timber before the birth of a tenant in tail: afterwards B. had a son, who died soon after his birth, and another son, who survived A. The produce of the timber was decreed to be laid out in the funds during the life of A.; and upon his death without having had a son was decreed to be laid out in land, to be settled to the uses of the estate, upon which the timber was cut. *Williams* v. *Duke of Bolton*, *Powlett* v. *The Duchess of Bolton* 21

TIMBER. *See* **Tenant for Life.**

TITHE.—1. A grant of all tithes arising out of or in respect of farms, lands, &c., includes the tithes arising out of land subsequently allotted under an inclosure, in respect of rights of common appurtenant to the lands described in the conveyances. *Lord Gwydir* v. *Foakes* . . . 534

—— 2. **Presumption of exemption.**—Immemorial non-payment of any tithes from a district cannot raise a presumption of an exemption by grant from the lay-rector; but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful. *Lord Petre* v. *Blencoe* . . 878

TITLE.—Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges: therefore where the former descends *ex parte paternâ*, the latter *ex parte maternâ*, upon their union the paternal heir has no equity.

No act of the trustee can vary the right of the *cestui que trust:* but his situation may: as where the *cestui que trust* is his heir, the right to dower depends upon which dies first. *Selby* v. *Alston* 10

And see **Evidence, 8.**

TOLL—Mortgage.—A mortgage of turnpike tolls is within the statute 9 Geo. II. c. 36. *Knapp* v. *Williams* 252

And see **Poor Rate.**

TORT—Cause of action founded upon contract cannot be converted into a. *See* **Infant, 1.**

TREASON. *See* **Criminal Law, 4.**

TRESPASS—1. The judgment of the commissioners of land-tax on appeal is conclusive in an action of trespass brought against the officer for levying under a warrant of distress. *Patchett* v. *Bancroft* . . . 464

—— 2. **Legal process.**—In trespass for breaking and entering the plaintiff's close, and taking his goods, the defendant may justify under

sufficient legal process, if he had it in fact at the time, although he had at the time of entering assigned another cause for the seizure. *Crowther* v. *Ramsbottom* 540

VENDOR AND PURCHASER—1. **Conditions of Sale—Waiver.**—Where, by the terms of an auction, the sale is to be completed by a certain day, yet if neither party takes any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaser taking advantage of it at law. *Jones* v. *Price* 874

—— 2. **Mutual covenant.**—Plaintiff covenanted to sell to the defendant a school-house, &c. and to convey the same to him on or before the 1st August, 1797, and to deliver up the possession to him on 24th June, 1796; and in consideration thereof defendant covenanted to pay the plaintiff 120*l.* on or before the 1st August, 1797; held that the covenant to convey and that for the payment of the money were dependent covenants; and that the plaintiff could not maintain an action for 120*l.* without averring that he had conveyed or tendered a conveyance to the defendant. *Glazebrook* v. *Woodrow* 700

—— 3. **Rescission of contract.**—Where a man purchases at an auction two distinct lots which adjoin, and which would more conveniently be occupied together, he is not obliged to go on with the purchase of either, unless the seller can make a good title to both. *Gibson* v. *Spurrier* . . . 887

WILL—1. **Administration.**—Notwithstanding declarations of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets; which were insufficient for the legacies; a charge on the real estate failing for want of a proper attestation of the will.

Undertaking to do something if the will is not changed, is binding. *Byrn* v. *Godfrey* 155

—— 2. Real estate devised subject to an express charge of debts must be applied in payment of debts in exoneration of a pecuniary legatee, whose legacy is not charged on the land. *Norman* v. *Morrell* . . . 347

—— 3. **Devise to charity—cy pres.**—Upon a devise to trustees in favour of a corporation to be thereafter formed for a good charitable use the heir has no right to the rent and profits accrued, before the devise is carried into effect.

The general charitable purpose of the testator shall be executed upon the doctrine of *cy pres*, though the particular purpose fails.

An account decreed and a receiver appointed upon the laches of the heirs, substituted by decree as trustees to execute a devise to charity.

Devise upon a future contingency; and no intermediate disposition of the rents and profits; a resulting trust for the heir.

The jurisdiction of the Court of Chancery upon Informations for establishing charities arose since the reign of Elizabeth.

Feoffment to the use of the poor generally is good. *Attorney-General* v. *Bowyer* 132

—— 4. A college, devisee in remainder, after estates for lives, in trust for purposes partly for their own benefit, and very specific with respect to them, held not to have accepted the devise by acts done merely to preserve the fund; and refusing to accept after the death of the tenants for life, the master was directed to receive a proposal, in order to have it determined, whether it could be executed *cy pres*. *Attorney-General* v. *Andrew* . 110

—— 5. **Codicil.**—All codicils are part of the will. Therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil.

Two inconsistent wills: a codicil referring to the first by date as the last will cancels the intermediate will; and evidence of mistake cannot be admitted. *Crosbie* v. *Mac Doual* 301

WILL—6. Construction.—Testator gave a sum, part of his 4 per cent. Bank Annuities, to his wife for life, and after her decease to several relations. Evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, and invested the produce in Long Annuities, and to shew the cause of the mistake; and the legacies were established.

Bequest of stock: if the testator has it at the time, it is specific; and any act destroying it proves an intention to revoke. *Selwood* v. *Mildmay* . 1

—— 7. Testator by his will gave legacies to A. and B. describing them as grandchildren of C., and their residence in America: by a codicil he revoked these legacies, giving as a reason that the legatees were dead: that fact not being true, they were held entitled upon proof of identity.

A married woman, living in America, being entitled to a legacy, a commission to examine her would have been directed; but as she had been examined under a commission issued by the American Government, that was considered sufficient.

Legatee entitled notwithstanding a mistake of his name.

Legacy to a married woman, subject of a foreign state, paid to the husband; to whom it would by the law of that country belong. *Campbell* v. *French* 5

—— 8. A condition inconsistent with the gift is void; therefore upon a bequest to A. for life, and at his decease to his heirs, executors, &c., but if he attempts to dispose of the principal, over, he takes the absolute interest; and the condition, being inconsistent with it, is void.

Condition, that tenant in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void. *Bradley* v. *Peixoto* 7

—— 9. Legacy in trust for testator's mother and sister for life, and after the death of the survivor for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at twenty-one; and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one: the payment only is postponed, not the vesting. Testator in India gives all his estate and effects to A. in England in trust, and directs his property to be remitted to him; and after several legacies he gives A. 800*l.*, and requests him as soon as the property is remitted to lay out the same in the funds or other securities which shall appear most advantageous for those, who shall be benefited by it hereafter: the 800*l.* is a beneficial legacy, not in trust. *Wadley* v. *North* 16

—— 10. Limitation over upon the death of a person unmarried and without issue; "unmarried," in its usual sense, meaning never having been married, "and" was construed "or" to afford a reasonable construction. Words of survivorship added to a tenancy in common in a will are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent.

In Statute 3 W. & M. c. 11, the apparent meaning of the word "unmarried" is, not married at the particular time, contrary to its usual import. *Maberly* v. *Strode* 61

—— 11. Leasehold property bequeathed in remainder in trust for a child *en ventre*, if a son, for life; and after his decease for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator: a son being born and dying without issue, the limitation over was established in favour of the next of kin according to the Statute at the time of distribution. *Long* v. *Blackall* 73

—— 12. Money bequeathed to be laid out in land to be settled upon the testator's nephew A. for life; remainder to the wife of A. for life, with re-

mainders in tail to the sons and daughters of A. by such wife; A. was not married till after the death of the testator: held to extend to a second wife. *Peppin* v. *Bickford* 103

WILL—13. An interest given to two or more either by way of legacy or otherwise is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction; as in partnerships, a joint mortgage, &c.

Specific legacy of stock decreed according to the value at the time it ought to have been transferred. *Morley* v. *Bird* 106

—— 14. Devise of real estates of the annual value of nearly 5,000*l*., and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000*l*. to trustees and their heirs, &c., upon certain peculiar trusts for accumulation and ultimate distribution. [Full report reserved for the appeal to the House of Lords (1805) in a later volume.] The trusts of the will were established. *Thellusson* v. *Woodford*, *Woodford* v. *Thellusson* 205

—— 15. Residuary bequest to trustees upon trust to pay the dividends, &c., equally between the testator's two great-nieces until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively, held a vested interest before marriage; being taken out of the general rule from the Civil Law; that *dies incertus in testamento conditionem facit*. One of the legatees being dead without having been married, the Court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply in case of her marriage or her death before marriage. *Booth* v. *Booth* . . . 235

—— 16. Testator made a provision for his wife; and gave a sum of money in trust for the separate use of a daughter, and after her death to divide the principal equally between her children and their issue at twenty-one; if none such, to his son, whom he made residuary legatee. Then after similar, but unequal, provisions for his other children he declared, that the provision in the will for his said wife and their said children was in satisfaction of all right, claim, &c., which she, or they, or any or either of them, could set up, &c., or which she and they would be entitled to under his marriage articles; and if his said wife and children or either of them should refuse, &c. he revoked the legacy and bequest therein contained to the use and benefit of such one or more of them his said wife and children, who should refuse or decline to execute such release or discharge; and declared the same void as to such one or more of them, who should so refuse, as though he had died intestate. A child, electing to take under the articles, forfeits the life-interest, which falls into the residue: but the children of such child are not bound by the election, and liberty was given to apply on the death of the parent. *Ward* v. *Baugh* 307

—— 17. Testator by a will unattested, after, among others, charitable legacies, to be distributed by his executor or executors, gave the remainder and residue of his estate, if any, and effects of what nature soever, and wheresoever, which he should be seised or possessed of, &c. "next kin or heir at law whom I appoint my executor" after debts, &c. paid. He left one brother, and by deceased brothers a niece and several nephews, one of whom was heir at law. Distribution decreed according to the Statute. *Lowndes* v. *Stone* 316

—— 18. Testator bequeathed a leasehold estate (after an estate for life) to his nephew A. and the heirs male of his body lawfully begotten, and in default of such heirs to one of the sons of his nephew B. as A. shall direct by a conveyance in his life or by his last will. Another leasehold estate he bequeathed to A. upon trust, subject to certain charges, to employ the re-

mainder of the rent to such children of B. as A. shall think most deserving and that will make the best use of it, or to the children of his nephew C. if any such there are or shall be. A. dying in the testator's life, the bequest of the latter estate was established in favour of all the children of B. and C.

The question arising on the former bequest was reserved until the death of the tenant for life. The omission or failure of a trustee to exercise a power of appointment entrusted to him to be exercised for the benefit of others is not allowed in equity to defeat their interests. In such case a trust for their benefit may be implied in default of appointment. *Brown* v. *Higgs* . 323

WILL—19. The personal estate is the natural fund for the debts; and can only be exempted by the intention to exempt it expressed in the will: a charge upon real estate, however anxious, is not of itself sufficient. *Tait* v. *Lord Northwick* 358

—— 20. A. by will bequeathed to his wife (besides some other legacies) a leasehold estate at N. for her life, and a leasehold estate at W. to B.; and by his codicil he directed that the bequests to his wife in his will should be in full of all claims she should be entitled to on his real or personal estate (except the estate for life of his wife in the premises at W.): Held, that the wife was not entitled to the estate at W. by the codicil. *Skerratt* v. *Oakley* 504

—— 21. Under a devise to A. and the heirs of her body for ever as tenants in common, and not as joint tenants, and in case A. die before twenty-one or without leaving issue of her body then to B.; held that A. took an estate tail. *Doe* d. *Candler* v. *Smith* 521

—— 22. A devise of lands to trustees and their heirs, upon trust to permit a *feme covert* to receive and take the rents and profits during her life, for her sole and separate use, and after her decease then to the use of the first and other sons of her body, and in default of such issue then to the use of the daughters as tenants in common and in default of such issue upon further trust to permit another *feme covert* to take the rents and profits during her life for her separate use, &c., vests the legal estate in the trustees in fee simple. *Harton* v. *Harton* 537

—— 23. The words "in default of such sons" after estates tail given to sons in succession construed so as to make the subsequent gift a vested remainder. *Doe* d. *Dacre* v. *Dacre; Lady Dacre* v. *Doe* 607

—— 24. Lands usually occupied with a house, will not pass under a devise of "a messuage, with the appurtenances," unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense. *Buck* d. *Whalley* v. *Nurton* 762

—— 25. **Legacy.**—Testatrix gave to A. the dividends of 500*l.* stock, till he should attain the age of thirty-two; at which time she directed her executors to transfer the principal to him; the legacy does not vest till the age of thirty-two. *Batsford* v. *Kebbell* 15

—— 26. **Legacy.**—Legacy of "1,000*l.* out of my Reduced Bank Annuities" held pecuniary: the Court leaning against holding a legacy specific, unless clearly intended.

"Of my stock," or "in my stock," or "part of my stock," will make a legacy specific. *Kirby* v. *Potter* 342

—— 27. **Legacy.**—If a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the rule of the Civil Law is adopted, and the legacy fails. Therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described as such, but who at the time of the marriage ceremony with her had a wife living, the Court in respect of his conduct held him not entitled; but inclined to think

it would be otherwise, where from circumstances not moving from the legatee himself the description is inapplicable; as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed upon in that respect.

By the Civil Law a false reason given for a legacy is not of itself sufficient to destroy it, unless the gift was induced by fraud. *Kennell* v. *Abbott* . 351

WILL—28. **Legacy to executor.**—An executor, who died before probate, was held entitled to a legacy given for his care and loss of time in the execution of the trusts of the will by having concurred with the other executors in directions for the funeral and in paying some small sums on that occasion. *Harrison* v. *Rowley* 199

—— 29. **Legacy—Infant.**—Legacy at twenty-one, the interest for maintenance, not satisfied by advancements during minority for the infant's benefit; nor by a legacy larger, but of a different nature, received under the will of the executor: there being no positive relinquishment; though no demand for ten years. *Lee* v. *Brown* 208

—— 30. **Legacy—Satisfaction.**—Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended: the presumption is not rebutted by slight circumstances: accounts in the testator's handwriting were admitted as evidence of the circumstances under which he made his will; but not to explain the will.

The Court will lay hold of any little circumstances to get out of the rule that a debt is satisfied by an equal legacy. *Hinchcliffe* v. *Hinchcliffe* . 89

—— 31. As to a presumed satisfaction of a debt by a legacy there is no distinction between the cases of parent and child and of strangers; therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of satisfaction.

Portion by will *primâ facie* a satisfaction of a portion by settlement. *Tolson* v. *Collins* 264

—— 32. **Legacy to chapel trustees.**—Legacy to the trustees of a chapel for Protestant Dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, is void under the stat. 9 Geo. II. c. 36. The mortgage having been paid off by other funds in the testator's life, the Court would not say, the legacy might not have been applied in repairing or sustaining the chapel; but was of opinion, it could not be applied to any other charitable purpose.

Bequest of money to enable a trustee for a charity to complete a contract for the purchase of land is void by the statute 9 Geo. II. c. 36. *Corbyn* v. *French* 254

—— 33. "**Plan of a Will.**"—Testamentary paper headed Plan of a Will and similarly endorsed, signed by the testator and internally referred to as his last will and testament, containing legatory words of present gift, presumably no will, but only a project of a will, not a complete testamentary disposition. *Mathews* v. *Warner* 192

—— 34. **Revocation.**—Testator by codicil in 1776 reciting, that he had devised his real estate by his last will, dated 25th November, 1752, charged his real estates with his debts, and legacies given by the codicil, and appointed executors: the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil; stating, that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator by the death of the other party was bound, if not in law, in honour; and did not mean to revoke the will of 1756 and revive that of 1752; and praying, that the will of 1756 and the codicil might be established, the trusts carried into execution, and the legacy paid: upon an issue directed the will of 1752 was established; evidence of mistake being rejected: on farther directions the plaintiffs relied on the agreement, and offered evidence in sup-

port of it. The bill was dismissed; the Lord Chancellor being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received; and that upon the evidence the agreement was uncertain and unfair, and therefore not to be executed. *Lord Walpole* v. *Lord Orford* 38

WILL—35. **Trust for improvement of city.**—Bequest for the improvement of the city of Bath, construed to mean improvements carried on under an Act of Parliament, not by private persons.

Specific disposition by will in trust to sell, and in the first place pay debts, legacies, and charges of probate and execution of the trust, and in the next place, that the residue of the money be appropriated to the improvement of the city of Bath, is void by statute 9 Geo. II. c. 36, as to a navigation share; which, being real estate, goes to the heir; and as to money on real securities, as mortgages, turnpike bonds, and commissioners' bonds for the improvement of the city of Bath; which go to the next of kin: the general residue undisposed of was first applied to the debts and other charges; and the deficiency was borne by the trust property, that passed to the city of Bath, and that, of which the disposition failed by the statute, *pro ratâ*. *Howse* v. *Chapman* 292

And see **Copyhold**, 1.

WRIT. *See* **Execution**; *and* **Trespass**, 2.

END OF VOL. IV.

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